No. 15-1359
Vide 15-1358,
15-1363

Title:	John D. Ashcroft, former Attorney General, et al., Petitioners v. Ahmer Iqbal Abbasi, et al.
Docketed:	May 9, 2016
Linked with 15A898	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(13-981, 13-999, 13-1002, 13-1003, 13-1662)
Decision Date:	June 17, 2015
Rehearing Denied:	December 11, 2015

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 29 2016	Application (15A898) to extend the time to file a petition for a writ of certiorari from March 10, 2016 to April 11, 2016, submitted to Justice Ginsburg.
Feb 29 2016	Application (15A898) granted by Justice Ginsburg extending the time to file until April 11, 2016.
Apr 1 2016	Application (15A898) to extend further the time from April 11, 2016 to May 9, 2016, submitted to Justice Ginsburg.
Apr 1 2016	Application (15A898) granted by Justice Ginsburg extending the time to file until May 9, 2016.
May 9 2016	Petition for a writ of certiorari filed. (Response due June 8, 2016)
May 9 2016	Appendix of John D. Ashcroft, former Attorney General, et al. filed.
May 26 2016	Order extending time to file response to petition to and including August 8, 2016.
Jun 8 2016	Brief amici curiae of Former U.S. Attorneys General William P. Barr, et al. filed. VIDED.
Jun 14 2016	Waiver of right of respondent James W. Ziglar to respond filed.
Aug 8 2016	Brief of respondents Ahmer Iqbal Abbasi, et al. in opposition filed. VIDED.
Aug 24 2016	Reply of petitioners John D. Ashcroft, former Attorney General, et al. filed.
Sep 21 2016	DISTRIBUTED for Conference of October 7, 2016.
Oct 11 2016	Petition GRANTED The petitions for writs of certiorari in Nos. 15-1358 and 15-1363 are granted. The cases are consolidated and a total of one hour is allotted for oral argument. Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this petition.
Nov 10 2016	Letter from the Solicitor General regarding case caption. VIDED
Nov 18 2016	Joint appendix filed. VIDED.
Nov 18 2016	Brief of petitioners John D. Ashcroft, former Attorney General, et al. filed.
Nov 25 2016	Brief amici curiae of Former U.S. Attorneys General William P. Barr, et al. filed. VIDED.
Dec 2 2016	Application (16A546) of respondents to file a consolidated brief on the merits in excess of the word limit, submitted to Justice Ginsburg. VIDED.
Dec 2 2016	Application (16A546) granted by Justice Ginsburg to file a consolidated brief of respondents on the merits is excess of the word limit. VIDED.
Dec 5 2016	SET FOR ARGUMENT on Wednesday, January 18, 2017. VIDED

Dec 7 2016	Record requested from the U.S.C.A. 2nd Circuit.
Dec 12 2016	CIRCULATED.
Dec 12 2016	Motion of petitioners to enlarge the time for oral argument and for divided argument filed. VIDED.
Dec 19 2016	Brief of respondents Ahmer Iqbal Abbasi, et al. filed. VIDED. (Distributed)
Dec 20 2016	Brief amici curiae of Professors of Civil Procedure filed. VIDED. (Distributed)
Dec 22 2016	Brief amicus curiae of Commonwealth Lawyers Association filed. VIDED. (Distributed)
Dec 22 2016	Brief amici curiae of Medical and Other Scientific and Health-Related Professionals filed. VIDED. (Distributed)
Dec 23 2016	Brief amici curiae of Immigration Detention Advocacy Organizations filed. VIDED. (Distributed)
Dec 23 2016	Brief amicus curiae of The American Association for Justice filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Former Correctional Officials filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of The American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Americans United for Separation of Church and State, et al. filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Asian Americans Advancing Justice, et al. filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Karen Korematsu, et al. filed. VIDED. (Distributed)
Jan 6 2017	The motion of petitioners for enlargement of time for oral argument and for divided argument is granted in part and denied in part, and the time is divided as follows: 20 minutes for the Acting Solicitor General on behalf of petitioners in Nos. 15-1358 and 15-1359, 10 minutes for petitioners in No. 15-1363, and 30 minutes for respondents. Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this motion. VIDED.
Jan 11 2017	Reply of petitioners John D. Ashcroft, former Attorney General, et al. filed. (Distributed)
Jan 18 2017	Argued. For petitioners in 15-1358 and 15-1359: Ian H. Gershengorn, Acting Solicitor General, Department of Justice, Washington, D. C. For petitioners in 15-1363: Jeffrey A. Lamken, Washington, D. C. For respondents: Rachel Meeropol, New York, N. Y. VIDED.
Jun 19 2017	Adjudged to be REVERSED IN PART and VACATED and REMANDED IN PART. Kennedy, J., delivered the opinion of the Court with respect to Parts I, II, III, IV-A, and V, in which Roberts, C. J., and Thomas and Alito, JJ., joined, and an opinion with respect to Part IV-B, in which Roberts, C. J., and Alito, J., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined. Sotomayor, Kagan, and Gorsuch, JJ., took no part in the consideration or decision of these cases. VIDED.

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RECORD AND BRIEFS

15-1359

Supreme Court, U.S.
FILED
MAY - 9 2016
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

IBRAHIM TURKMEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General and Director of the Federal Bureau of Investigation (FBI) personally liable for policy decisions made about national-security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether the former Attorney General and FBI Director are entitled to qualified immunity for their alleged role in the treatment of respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether respondents' allegations that the Attorney General and FBI Director personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanation—identified by the Court in *Iqbal*—that their actions were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to leave the United States.

PARTIES TO THE PROCEEDING

Petitioners John D. Ashcroft (former Attorney General of the United States) and Robert Mueller (former Director of the Federal Bureau of Investigation) were defendants in the district court and cross-appellees in the court of appeals.

The other parties to the proceeding include the following:

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya, on behalf of a putative class, who were plaintiffs in the district court and appellees-cross-appellants in the court of appeals;

Dennis Hasty (former Warden of the Metropolitan Detention Center), Michael Zenk (former Warden of the Metropolitan Detention Center), and James Sherman (former Metropolitan Detention Center Associate Warden for Custody), who were defendants in the district court and appellants-cross-appellees in the court of appeals; and

James W. Ziglar (former Commissioner of the Immigration and Naturalization Service), who was a defendant in the district court and a cross-appellee in the court of appeals.*

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* Two other individuals (Salvatore Lopresti, former Metropolitan Detention Center Captain, and Joseph Cuciti, former Metropolitan Detention Center Lieutenant) were defendants in the district court but did not appear in the court of appeals. See App. 3a n.2.

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In the Supreme Court of the United States

No.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

IBRAHIM TURKMEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, former Director of the Federal Bureau of Investigation (FBI), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-163a) is reported at 789 F.3d 218. The opinions of members of the court of appeals concurring in and dissenting from the denial of rehearing en banc (App. 237a-250a) are reported at 808 F.3d 197. The opinion of the district court (App. 164a-236a) is reported at 915 F. Supp. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2015. Petitions for rehearing were denied on December 11, 2015 (App. 237a-238a). On February 29, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 11, 2016. On April 1, 2016, Justice Ginsburg further extended the time to May 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Like *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this case involves civil claims against high-ranking federal officials brought by aliens who were arrested for immigration violations by federal officials after the September 11, 2001 terrorist attacks and were detained at the Metropolitan Detention Center (MDC) in Brooklyn. Petitioners are the former Attorney General of the United States and the former FBI Director. As relevant here, six of the respondents claim, on behalf of themselves and a putative class, that the highly restrictive conditions of their detention violated their substantive-due-process and equal-protection rights under the Fifth Amendment. App. 301a-332a, 342a-343a (Fourth Am. Compl. ¶¶ 141-244, 276-283) (Compl.).[1]

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[1] Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya were detained in restrictive conditions at the MDC. App. 253a-254a (Compl. ¶ 4). The other two plaintiffs—Ibrahim Turkmen and Akhil Sachdeva—were detained with the general population at the Passaic County Jail in New Jersey. App. 253a (Compl. ¶ 4). Because the court of appeals affirmed the dismissal of the claims brought by the Passaic plaintiffs (App. 75a, 84a, 86a), this petition uses "respondents" to refer to the six MDC detainees, to the exclusion

Respondents contend that petitioners, along with other Department of Justice officials, are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and liable as co-conspirators under 42 U.S.C. 1985(3). See App. 255a-256a (Compl. ¶ 9). Respondents seek compensatory and punitive damages, as well as attorney's fees and costs, from those officials in their individual capacities. App. 348a (prayer for relief).

As the Court discussed in *Iqbal*, the Department of Justice conducted a massive investigation to identify the perpetrators of the September 11 attacks and prevent any follow-on attacks. 556 U.S. at 667. "The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor" and, in the first week, "'received more than 96,000 tips or potential leads from the public.'" *Ibid.* (quoting Office of the Inspector Gen., Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 12 (Apr. 2003) (*OIG Report*)).[2] During the investigation, federal officials arrested and detained 762 aliens on charges that they had violated federal immigration laws. *Ibid.*

Aliens deemed to be "of interest" to the investigation were subjected to an unwritten "hold until cleared" policy, under which they would not be released until the FBI had cleared them of any connections to terrorism. *OIG Report* 37-40. A total of 84 detainees were housed at the MDC for varying periods

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of the Passaic plaintiffs and the other defendants identified in the Parties to the Proceeding section (see p. II, *supra*).

[2] The *OIG Report* is available at https://oig.justice.gov/special/0306/full.pdf.

between September 14, 2001 and August 27, 2002. *Id.* at 111. When they arrived, they were placed in the Administrative Maximum Special Housing Unit (ADMAX SHU), where they were subjected to the most restrictive conditions of confinement authorized by Bureau of Prisons policy. *Id.* at 112; *Iqbal*, 556 U.S. at 667-668.

2. Respondents were among those detained in the ADMAX SHU for periods ranging from three to eight months. App. 2a, 253a-254a (Compl. ¶ 4).[3] In light of their immigration status, it was undisputedly lawful to arrest and detain them pending their removal from the United States. App. 2a & n.1; see *Iqbal*, 556 U.S. at 682; *Turkmen* v. *Ashcroft*, 589 F.3d 542, 549-550 (2d Cir. 2009). But respondents claim that the restrictive conditions of their confinement violated their substantive-due-process rights because the government allegedly lacked any individualized information indicating that they were dangerous or involved in terrorism; and respondents further claim that the conditions violated their equal-protection rights because they were allegedly singled out for such treatment on account of being (or being perceived as) Muslim and either Arab or South Asian. App. 254a (Compl. ¶ 4), 265a-267a (¶¶ 39-44), 342a-343a (¶¶ 276-283).

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[3] Respondents were not among the plaintiffs when this suit was initially filed in 2002. App. 3a-4a, 180a. After this Court's decision in *Iqbal*, an earlier appeal in this case was remanded to the district court. See *Turkmen* v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009). All of the original plaintiffs except the two who were detained at Passaic settled their claims. *Id.* at 545-546; App. 3a-4a, 180a-183a. The district court granted leave to amend the complaint in August 2010, App. 183a, and the Fourth Amended Complaint added the six respondents as members of a putative class of persons who were detained at the MDC, App. 251a-349a; see note 1, *supra*.

Respondents' Fifth Amendment claims are brought against two groups of defendants: (1) the "DOJ Defendants" (former Attorney General Ashcroft, former FBI Director Mueller, and a former Commissioner of the Immigration and Naturalization Service (INS)), and (2) the "MDC Defendants" (for current purposes, two former wardens and a former associate warden of the MDC). App. 3a n.2, 258a-261a (Compl. ¶¶ 21-28), 342a-343a (¶¶ 276-283).[4] The equal-protection portion of those claims is echoed in a separate claim that the DOJ Defendants and the MDC Defendants conspired with each other to deprive respondents of the equal protection of the laws, in violation of 42 U.S.C. 1985(3). App. 347a (Compl. ¶¶ 303-306).

3. The defendants moved to dismiss the complaint, arguing that the judicially inferred remedy under *Bivens* should not extend to some of the claims, that defendants are entitled to qualified-immunity, and that plaintiffs have failed to state a claim. App. 5a. The district court granted those motions in part and denied them in part. App. 164a-236a. As relevant here, the court dismissed the claims against the DOJ Defendants (including Ashcroft and Mueller) in their entirety, finding that respondents have not adequately alleged that those defendants were personally involved in (or were even aware of) the creation of conditions of confinement so restrictive as to constitute a substantive-

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[4] In claims not at issue here, respondents also allege First and Fifth Amendment violations (on the basis of restrictions on their communications with family or counsel or their ability to practice and observe their religion) as well as Fourth and Fifth Amendment violations (on the basis of allegations that they were subjected to excessive, unreasonable, and deliberately humiliating strip searches). App. 343a-347a (Compl. ¶¶ 284-302).

due-process violation (App. 196a-199a) and that respondents' equal-protection claim fails in light of *Iqbal*, because their allegations "do not plausibly suggest that the DOJ Defendants purposefully directed the detention of [respondents] in harsh conditions of confinement due to their race, religion or national origin" (App. 209a). The court declined to accept respondents' suggestion that it could infer any punitive intent "from the DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully*." App. 198a.

The district court denied the motion to dismiss with respect to several of the claims against the MDC Defendants, finding sufficient allegations of their personal involvement in restrictive conditions or abusive conduct and finding that they are not entitled to qualified immunity. App. 199a-203a, 209a-211a. In the course of doing so, the court rejected the argument (made by both the DOJ and MDC Defendants) that it should decline to extend the *Bivens* remedy to the substantive-due-process claim, observing that "conditions-of-confinement claims do not present a new context" for the application of *Bivens*. App. 193a n.10.

4. The MDC Defendants appealed, and respondents cross-appealed the dismissal of the claims against the DOJ Defendants. App. 19a-20a. In an opinion written by Judges Pooler and Wesley, the panel majority ruled for respondents on most issues. App. 1a-86a.[5]

a. The court of appeals first held that "a *Bivens* remedy is available for [respondents'] punitive conditions of confinement * * * claims against both the DOJ and the MDC Defendants." App. 22a. The court

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[5] The following discussion focuses on the resolution of the claims against petitioners.

acknowledged that "the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Ibid.* (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)). It concluded, however, that the claims in this case do not present a new "context" and therefore do not require any extension of *Bivens*. App. 24a-29a & n.17. In the court's view, respondents' substantive-due-process and equal-protection claims "stand[] firmly within a familiar *Bivens* context" because some cases have entertained *Bivens* claims for the same allegedly injured rights and other cases have, in the context of different constitutional rights, entertained *Bivens* claims premised on the same "mechanism of injury (punitive conditions without sufficient cause)." App. 24a-25a.

b. The court of appeals next held that respondents have adequately alleged a substantive-due-process claim of restrictive confinement against the DOJ Defendants. App. 30a-49a. The court recognized that the September 11 detainees were lawfully arrested, that they could be lawfully detained, and that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on anyone for whom the government had "individualized suspicion of terrorism." App. 31a. There was thus no constitutional objection to the confinement at the ADMAX SHU of detainees on "the national INS List," for whom the government had "a suspicion that they were connected to terrorist activities." App. 32a. At some point in October 2001, however, it became evident that some of the detainees on the so-called "New York List" had been arrested during the course of the September 11 investigation but placed on that list without any addi-

tional determination having been made that there was evidence tying them to terrorism. App. 37a-38a.

The court of appeals rejected respondents' theory that Ashcroft's original policies for the September 11 investigation had been intended to create such results. App. 31a. Nevertheless, it constructed a different rationale: The court believed it plausible that petitioners had violated respondents' substantive-due-process rights by deciding (or approving of the decision) to merge the New York List with the national INS List and to continue to subject all detainees to the hold-until-cleared policy. App. 32a-33a. As a result of that decision, "some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement," even though there had not already been an express determination that they were suspected of having any terrorism connections. App. 39a. The court found that, in the absence of such an individualized determination, "it would be unreasonable * * * to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." App. 43a. The court inferred that continued detention in such circumstances was "punitive" and therefore a substantive-due-process violation under *Bell* v. *Wolfish*, 441 U.S. 520 (1979). App. 44a-48a.

In addressing the DOJ Defendants' qualified-immunity argument, the court of appeals concluded that the constitutional violation was clearly established, because any "condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees" and "because a pretrial detainee's right to be free from punishment

does not vary with the surrounding circumstances." App. 48a, 49a.

c. The court of appeals also held that respondents have adequately alleged an equal-protection claim against the DOJ Defendants. App. 61a-68a. Again, the court relied on the lists-merger theory, finding it "reasonable to infer that [the DOJ Defendants] possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner" and, further, that they "condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement." App. 64a.

For qualified-immunity purposes, the court of appeals found it "clearly established at the time of [respondents'] detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." App. 74a.

d. The court of appeals also held that respondents have "plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim." App. 81a. It found that there was a "tacit agreement" between the DOJ Defendants and two of the MDC Defendants "to effectuate the harsh conditions of confinement with discriminatory intent." *Ibid.* It also found that, even though there had been uncertainty in 2001 about whether the statute applied to federal officials, the defendants could not claim qualified immunity because "federal officials could not reasonably have believed

that it was legally impermissible for them to conspire * * * to deprive a person of equal protection of the laws." App. 83a (citation omitted).

e. Judge Raggi concurred in part with the judgment and dissented at length. App. 86a-163a. She pointed out that the decision had made the Second Circuit the first court of appeals "to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials * * * for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001." App. 86a-87a. She disagreed with the majority's failure to affirm the dismissal of the claims against petitioners on multiple grounds. First, she concluded that the *Bivens* remedy should not be extended to the novel context of this case, which involves a challenge to policy decisions that implicate the Executive's immigration authority and national-security authority, when Congress has been informed of concerns about treatment of the September 11 detainees and failed to provide any damages remedy. App. 90a-118a. Second, she concluded that petitioners are entitled to qualified immunity because it was not clearly established that petitioners' conduct (even under the majority's theory) violated respondents' constitutional rights. App. 137a-145a, 155a-158a. And third, she concluded that respondents are also entitled to qualified immunity because there are insufficient allegations of their personal involvement in any substantive-due-process or equal-protection violations. App. 122a-137a, 148a-155a.[6]

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[6] Judge Raggi would also have dismissed the Section 1985(3) conspiracy claim for the same reasons as the equal-protection claim. App. 158a n.46.

5. Petitioners sought rehearing en banc, as did the other defendants. Because the 12 participating members of the court of appeals split evenly, rehearing was denied. App. 238a.

Judges Pooler and Wesley, the authors of the panel majority opinion, filed a short opinion concurring in the denial. App. 238a-240a. They reaffirmed their view that respondents have "plausibly" pleaded that "the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy" by "endors[ing] the restrictive detention of a number of men who were Arabs or Muslims or both." App. 239a. They concluded that, after 13 years of appellate litigation, "it is time to move the case forward." App. 240a.

Six judges—Judges Jacobs, Cabranes, Raggi, Hall, Livingston, and Droney—filed a joint dissent from the denial of rehearing en banc. App. 240a-250a. They expressly incorporated Judge Raggi's dissent from the panel's decision. App. 241a. But they further explained that "[t]he panel decision raises questions of exceptional importance meriting further review." *Ibid.* The dissenters concluded that the panel's decision did not comport with this Court's precedents in three areas of the law: "(1) the narrow scope of *Bivens* actions, (2) the broad shield of qualified immunity, and (3) the pleading standard for plausible claims." *Ibid.* With respect to the first area, the dissenters also noted that the decision was "at odds" with those of four sister circuits, which had already "declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks." App. 242a-243a (citing cases). Although the dissenters' "focus" was on the panel's decision "to allow [respondents] to pursue damages against the Attorney General

and FBI Director," they endorsed Judge Raggi's explanation that the "claims against other officials should also be dismissed." App. 249a-250a n.16.

REASONS FOR GRANTING THE PETITION

Based on conclusory allegations and after-the-fact inferences drawn in the chambers of appellate judges, the court of appeals concluded that the Nation's highest-ranking law-enforcement officers—a former Attorney General of the United States and former Director of the FBI—may be subjected to the demands of litigation and potential liability for compensatory and even punitive damages in their individual capacities because they could conceivably have learned about and condoned the allegedly improper ways in which their undisputedly constitutional policies were being implemented by lower-level officials during an unprecedented national-security crisis. Moreover, the court reached that troubling result without even considering whether "special factors counsel[] hesitation" before applying the judicially inferred remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971), in the context of this case, which challenges high-level policy decisions implicating both national security and immigration.

Six members of the court of appeals correctly concluded that the panel's decision "raises questions of exceptional importance meriting further review," that it departs from this Court's precedents in three separate areas of the law, and that it puts the Second Circuit "at odds" with several other circuits. App. 241a, 242a-243a, 249a (joint dissent from denial of rehearing en banc). As it did in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), the Court should grant a writ of certiorari to correct those serious errors.

A. Special Factors Counsel Against Extending The Judicially Inferred *Bivens* Remedy To This Challenge To High-Level Executive Policymaking At The Confluence Of National Security And Immigration

This Court has "consistently and repeatedly recognized" the need for "caution toward extending *Bivens* remedies into any new context." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). Yet, by adopting a novel, blinkered approach, the decision below disregarded multiple factors that should have prevented it from extending *Bivens* to respondents' constitutional claims against the Attorney General and FBI Director. The court of appeals' method of analysis departs sharply from that used in other circuits, and the Second Circuit is the first circuit to permit such a damages remedy to be pursued "against executive branch officials for national security actions taken after the 9/11 attacks." App. 242a-243a (joint dissent from denial of rehearing en banc) (citing cases from the Fourth, Seventh, Ninth, and D.C. Circuits declining to recognize an extension of *Bivens* to such claims). Review by this Court is necessary to eliminate the Second Circuit's outlier status.[7]

1. In *Bivens*, this Court "recognized for the first time an implied private action for damages against

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[7] As Judges Pooler and Wesley noted, petitioners opposed the extension of *Bivens* in the district court but did not repeat that argument as an alternative ground of affirmance before the court of appeals panel. App. 21a. Petitioners did, however, include the issue in their petition for rehearing (at 11-13). And, because the issue was expressly passed upon by the court of appeals, App. 21a-29a, review would require no departure from this Court's "traditional rule," which "permit[s] review of an issue not pressed so long as it has been passed upon," *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 556 U.S. at 675 (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search and arrest. *Bivens*, 403 U.S. at 389. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has since "retreated" because they reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Malesko*, 534 U.S. at 67 & n.3 (citation omitted). Because such "implied causes of action" are now "disfavored," the Court has emphasized its "reluctan[ce] to extend *Bivens* liability to any new context or new category of defendants." *Iqbal*, 556 U.S. at 675 (citation and internal quotation marks omitted). For more than 35 years, the Court "ha[s] consistently refused to extend *Bivens* liability." *Malesko*, 534 U.S. at 68; see *Minneci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases). Thus, even when there is no indication from Congress that the Judiciary should "stay its *Bivens* hand," courts still must "'pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

2. The decision below erroneously concluded that this case "stands firmly within a familiar *Bivens* context." App. 25a. In reaching that result, the court of

appeals drained the term *context* of all meaning. It characterized respondents' claims at a high level of abstraction: "federal detainee [p]laintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions." App. 24a. The court then considered only whether two aspects of the abstract claim—"the rights injured" and "the mechanism of injury"—have any antecedents in prior *Bivens* cases. App. 24a-25a. In its view, the alleged "rights injured" were "substantive due process and equal protection rights," and the alleged "mechanism of injury" was "punitive conditions [of confinement] without sufficient cause." *Ibid.* The court believed that prior cases supported each half of that comparison, preventing the case from presenting "a new context" and obviating any need to hesitate before allowing the damages action to proceed. App. 24a-25a & n.15, 29a n.17.

a. On its own terms, that analysis is unpersuasive. As Judge Raggi's dissent pointed out, the court of appeals identified no established *Bivens* cases that shared both of the majority's selected attributes, and the panel majority was therefore forced to "mix and match a 'right' from one *Bivens* case with a 'mechanism of injury' from another." App. 95a. Moreover, the court's framework cannot even be reconciled with the few prior cases the court invoked. For instance, the court acknowledged that this Court recognized a *Bivens* action to redress an equal-protection claim about employment discrimination in *Davis* v. *Passman*, 442 U.S. 228 (1979), but then "declined to extend *Davis* to other employment discrimination" arising in the military context in *Chappell* v. *Wallace*, 462 U.S. 296 (1983). App. 24a n.15. The court of appeals attributed that difference to "the special nature of the

employer-employee relationship in the military—or, in other words, the mechanism of injury." *Ibid.* Yet, respondents, who were detained on the basis of immigration violations during a national-security investigation, are even less like civilian federal employees who could have brought equal-protection claims under *Davis* than are members of the military (who may not bring equal-protection claims under *Chappell*). In other words, even if the alleged "mechanism of injury" were the proper focus of the *Bivens*-context inquiry, *Davis* and *Chappell* counsel strongly *against* the application of *Bivens* here.

b. More fundamentally, the court of appeals erred in failing to take account of several factors that make the context of this case a novel one for *Bivens* purposes. By defining the "mechanism of injury" in relevant part as "punitive conditions [of confinement] without sufficient cause" (App. 24a-25a) while refusing to take account of any of the surrounding circumstances, the decision below takes an unduly categorical approach, and therefore opens the door to potential *Bivens* liability in a range of sensitive contexts where other courts have declined to entertain *Bivens* claims that individual federal officers subjected federal detainees housed in federal facilities to cruel treatment.[8]

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[8] See *Vance* v. *Rumsfeld*, 701 F.3d 193, 198-203 (7th Cir. 2012) (en banc) (declining to recognize *Bivens* claim for alleged mistreatment or abuse of detainees by military personnel and civilian superiors), cert. denied, 133 S. Ct. 2796 (2013); *Doe* v. *Rumsfeld*, 683 F.3d 390, 393-397 (D.C. Cir. 2012) (declining to recognize *Bivens* claim arising from alleged mistreatment of military detainee); *Lebron* v. *Rumsfeld*, 670 F.3d 540, 552-556 (4th Cir.) (declining to recognize *Bivens* claim arising from designation and alleged mistreatment of enemy combatant), cert. denied, 132 S. Ct. 2751 (2012); *Ali* v. *Rumsfeld*, 649 F.3d 762, 773-774 (D.C. Cir. 2011)

Respondents' claims against Ashcroft and Mueller are far from the "familiar *Bivens* context." App. 25a. Respondents seek to challenge high-level policy decisions and to do so in a context that implicates both national security and immigration. Each of those considerations has been identified by other circuits as a reason to hesitate before extending *Bivens*.

The heart of respondents' complaint attacks what they characterize as fundamental "policy" decisions made by the Attorney General in the course of the September 11 investigation: an alleged "policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism" and "a blanket 'hold-until-cleared' policy," under which out-of-status aliens identified as being of interest to the investigation would not be released until the FBI had "affirmatively cleared them of terrorist ties." App. 252a-253a, 265a (Compl. ¶¶ 2, 39). This Court, however, has "never considered" the *Bivens* remedy to be "a proper vehicle for altering an entity's policy." *Malesko*, 534 U.S. at 74. *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers," not "deterring the conduct of a policymaking entity." *Id.* at 71; see also *ibid.* ("*Bivens* from its inception has been based * * * on the deterrence of individual officers who commit unconstitutional acts"); *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994).

The Attorney General and FBI Director are, to be sure, individual federal employees who are bound to follow the Constitution. But their high-level policy

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(declining to recognize *Bivens* claim arising from alleged torture of military detainee); *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) (declining to recognize *Bivens* claim arising from alleged mistreatment of military detainees), cert. denied, 558 U.S. 1091 (2009).

decisions are materially different from the unauthorized actions of rogue officers that *Bivens* typically serves to deter. Most saliently, such policy decisions are more likely to receive scrutiny from non-judicial sources, such as the Inspector General and Congress. Indeed, that is what happened here. See *OIG Report* 37-71, 111-164 (addressing hold-until-cleared policy and conditions of confinement at the MDC); App. 114a-118a (Raggi, J., dissenting in relevant part) (discussing Congress's awareness of those policies, its consideration of possible remedies, and its failure to enact any damages remedy). Thus, before this case, the Second Circuit itself, sitting en banc to consider another *Bivens* claim against former Attorney General Ashcroft, distinguished between "policies promulgated and pursued by the executive branch" and "isolated actions of individual federal employees." *Arar* v. *Ashcroft*, 585 F.3d 559, 578 (2009), cert. denied, 560 U.S. 978 (2010). And the Seventh Circuit observed—in rejecting a *Bivens* claim against another Cabinet officer—that "the normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author." *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

The nature of the policy decisions in this case also serves to define the context of respondents' claims. Those policies implicate both national security and immigration—two areas that have been independently recognized as ones into which courts should generally be reluctant to intrude on their own initiative. App. 106a-114a (Raggi, J., dissenting in relevant part); see generally *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (national security); *Harisiades* v. *Shaughnessy*, 342 U.S.

580, 588-589 (1952) (immigration). When presented with *Bivens* claims, other courts of appeals have repeatedly recognized that, when a constitutional claim implicates either national security or immigration, that consideration both alters the relevant context of the claim and counsels against an extension of *Bivens*. See, *e.g.*, *Alvarez* v. *ICE*, No. 14-14611, 2016 WL 1161445, at *11-*16 (11th Cir. Mar. 24, 2016) (immigration); *Meshal* v. *Higgenbotham*, 804 F.3d 417, 423-425 (D.C. Cir. 2015) (national security); *De La Paz* v. *Coy*, 786 F.3d 367, 371-380 (5th Cir. 2015) (immigration), petition for cert. pending, No. 15-888 (filed Jan. 12, 2016); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2012) (same), cert. denied, 133 S. Ct. 2336 (2013); *Lebron* v. *Rumsfeld*, 670 F.3d 540, 552-556 (4th Cir.) (national security), cert. denied, 132 S. Ct. 2751 (2012); *Ali* v. *Rumsfeld*, 649 F.3d 762, 773-774 (D.C. Cir. 2011) (same). The decision below erred in failing to recognize the novel context of respondents' claims and therefore in failing even to consider what the next step in the analysis would have shown: that the multiple special factors presented here, when taken in combination, counsel decisively against allowing respondents' *Bivens* claims against the former Attorney General and FBI Director.

3. No other court of appeals has adopted a mode of analysis that—like the decision below—would disregard altogether the fact that a claim arises in the context of immigration or national security. To be sure, the precise combination of factors that makes the *Bivens* remedy inappropriate here has not arisen in other circuits, but the dissenting judges are surely correct that the decision here is "at odds" with those of

other circuits. App. 243a.[9] No other court of appeals would simply pretend that this unprecedented case "stands firmly within a familiar *Bivens* context." App. 25a. And no other court of appeals has "extend[ed] *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks." App. 242a-243a (joint dissent from denial of rehearing en banc) (citing cases from Fourth, Seventh, Ninth, and D.C. Circuits declining to extend *Bivens*).

As relevant here, respondents' *Bivens* claims challenge the exercise by the Attorney General and the FBI Director of the Executive's constitutional authority to protect national security, to investigate a violent attack against the Nation on our own soil, and to enforce the immigration laws. Deterring national officeholders from "full use of their legal authority" in such contexts has "consequences" that "counsel caution by the Judicial Branch." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 747 (2011) (Kennedy, J., concurring). The court of appeals' casual extension of *Bivens* to this novel context warrants immediate review.

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[9] In *Alvarez*, the Eleventh Circuit expressly sought to distinguish this case. See 2016 WL 1161445, at *12 n.6. In *Meshal*, the D.C. Circuit declined to decide whether the national-security context of a terrorism investigation would be sufficient, in the domestic context, to preclude a *Bivens* remedy. See 804 F.3d at 425. In *De La Paz*, three judges dissenting from denial of rehearing en banc characterized the Fifth Circuit's decision as being "in conflict" with the Second Circuit's decision in this case, but they referred to its discussion of *Fourth* Amendment claims against the MDC Defendants (App. 28a-29a) not of the *Fifth* Amendment claims against Ashcroft and Mueller. See *De La Paz* v. *Coy*, 804 F.3d 1200, 1202 (2015) (Prado, J., dissenting from denial of rehearing en banc, joined by Dennis and Graves, JJ.).

B. It Was Not Clearly Established That Aliens Legitimately Arrested During The September 11 Investigation Could Not Be Subjected To Restrictive Conditions Of Confinement Until They Were Cleared Of Any Connections With Terrorism

Even assuming arguendo that respondents have plausibly alleged that Ashcroft and Mueller personally condoned or endorsed a decision to merge two lists of September 11 detainees (but see pp. 27-31, *infra*), they would still be entitled to qualified immunity because, at the time, it was not clearly established that continued confinement in restrictive conditions under the hold-until-cleared policy would be seen as unjustified and therefore attributable only to either punitive or discriminatory intentions. In concluding otherwise, the court of appeals defined the relevant legal question at too high a level of generality, committing a mistake that this Court has often had to correct to ensure that qualified immunity continues to serve its vital purpose of protecting "all but the plainly incompetent or those who knowingly violate the law." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

1. For three decades, this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742); see also, *e.g.*, *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 n.5 (2012); *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). Instead, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful

in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

2. The court of appeals flouted that long-standing instruction.

a. With respect to respondents' substantive-due-process claim, there is no dispute that the September 11 detainees were lawfully arrested, that they could be lawfully detained, and that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on anyone for whom the government had "individualized suspicion of terrorism." App. 31a. Under the court of appeals' lists-merger theory, however, detainees on the New York List were deemed the equivalent of "ordinary civil detainees," because it was eventually discovered that some of them had been arrested and detained without any separate determination that there was evidence linking them to terrorism. App. 39a, 43a. Thus, when the court addressed qualified immunity, it simply said that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees" and that "a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances." App. 48a, 49a.

Those general formulations, however, failed to account for the actual circumstances that confronted Ashcroft and Mueller when they allegedly condoned the merger of the two lists of detainees. The relevant question is not whether "ordinary civil detainees" or "pretrial detainee[s]" (App. 43a, 49a) could be held in the restrictive conditions at the ADMAX SHU for no reason. Instead, the correct question is whether all aliens on the New York List (each of whom had been

legally arrested and detained in conjunction with the September 11 investigation) had a clearly established right to be immediately released from restrictive conditions of confinement merely because it came to light that, in some instances, arresting officers had failed to conduct the same initial vetting that detainees on the national INS List had received.

The court of appeals identified no cases indicating, much less establishing, that the Constitution prevented officials in such circumstances from reacting to that unexpected development by "err[ing] on the side of caution," preserving the status quo, and continuing to subject *all* the detainees to the hold-until-cleared policy in order to ensure "that a terrorist would not be released by mistake." *OIG Report* 56. That cautious approach was not manifestly unreasonable or plainly unrelated to any "legitimate governmental objective." App. 48a. As Judge Raggi's dissent explained, even "in the absence of individualized suspicion of terrorist connections," it was not "arbitrary or purposeless to national security to hold such illegal aliens in restrictive * * * confinement pending clearance." App. 141a.[10]

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[10] Nor was it clearly established in 2001 that the Constitution forbade "restrictive confinement of lawfully detained persons" on the basis of "general, rather than individualized, suspicion of dangerousness." App. 247a (joint dissent from denial of rehearing en banc); see App. 139a-140a (Raggi, J., dissenting in relevant part) (discussing *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012) (intake strip searches of all arrestees); *Whitley* v. *Albers*, 475 U.S. 312, 316 (1986) (shooting policy during prison riot); *Block* v. *Rutherford*, 468 U.S. 576, 585-587 (1984) (blanket prohibition on contact visits); *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979) (body-cavity searches of pre-trial detainees after contact visits)).

The court of appeals' decision is contrary to this Court's repeated admonitions that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743; see also *ibid.* (explaining that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") (citation omitted). As Judge Raggi observed, it is impossible to "conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy." App. 120a. Indeed, the 6-6 vote in the court of appeals bolsters petitioners' entitlement to qualified immunity,[11] as does the Inspector General's conclusion, with the benefit of hindsight, that the decision to merge the lists was "supportable, given the desire not to release any alien who might be connected to the attacks or terrorism." *OIG Report* 71.

b. For similar reasons, petitioners are entitled to qualified immunity on respondents' equal-protection claim. As with the substantive-due-process claim, the court of appeals' inference of unconstitutional purpose was based on its determination that "there was no legitimate reason to detain [respondents] in the challenged conditions," when "the DOJ Defendants knew that the government lacked information tying [respondents] to terrorist activity, but decided to merge

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[11] See *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *al-Kidd*, 563 U.S. at 743 (citing eight-judge dissent from denial of rehearing in finding that former Attorney General Ashcroft "deserve[d] qualified immunity" for an alleged policy about detention of terrorism suspects).

the lists anyway." App. 65a-66a. But, as discussed above, that determination was not divorced from security concerns. Thus, "no clearly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance." App. 157a-158a (Raggi, J., dissenting in relevant part).

c. The absence of a clear deprivation of the equal protection of the laws prevents conspiracy liability under 42 U.S.C. 1985(3) from being clearly established. See App. 158a n.46 (Raggi, J., dissenting in relevant part). But the court of appeals further erred in rejecting a separate reason—independent of the merits of the underlying equal-protection allegations—that any violation of Section 1985(3) was not clearly established due to other uncertainties about the statute's scope. On this point, the court simply adopted the reasoning of its prior decision in *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd on other grounds, 556 U.S. 662 (2009). See App. 83a-84a. That reasoning was fatally flawed.

Hasty conceded that "it was not clearly established in 2001" that Section 1985(3) even "applied to federal officials." 490 F.3d at 176. The *Hasty* court found that uncertainty irrelevant to its qualified-immunity analysis because it believed that, as long as there was *some* right to equal protection of the laws, it did not matter whether the "*source*" of such a right was the Constitution or the statute. *Id.* at 177 (citation omitted). That rationale cannot be squared with this Court's cases, which recognize that qualified immunity applies unless the defendant's alleged actions clearly violated *the specific right* that provides the basis for the plaintiff's claim. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials sued for violations of rights

conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation."); *ibid.* ("Neither federal nor state officials lose their immunity by violating the clear command of a statute * * * unless that statute * * * provides the basis for the cause of action sued upon."); see also *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (to defeat immunity, "the clearly established right" must be "the federal right on which the claim for relief is based"). Accordingly, whether or not respondents have articulated a clearly established equal-protection claim for purposes of *Bivens*, they certainly have not done so for purposes of their statutory claim.

3. The six dissenters correctly concluded that the court of appeals' "denial of qualified immunity in the unprecedented circumstances of this case" warrants further review. App. 247a. As it has done in so many other recent cases where any constitutional violation had not been clearly established at the time of the underlying conduct, this Court should correct the court of appeals' misapplication of qualified-immunity doctrine.[12] More than 14 years after this case began, the Court should confirm that the former Attorney General and former FBI Director are entitled to qualified immunity. See *Iqbal*, 556 U.S. at 685 (noting that "[t]he basic thrust of the qualified-immunity doctrine

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[12] See, *e.g.*, *Mullenix*, 136 S. Ct. at 308-312; *Taylor* v. *Barkes*, 135 S. Ct. 2042, 2044-2045 (2015) (per curiam); *City & County of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1775-1778 (2015); *Carroll* v. *Carman*, 135 S. Ct. 348, 350-352 (2014) (per curiam); *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2022-2024 (2014); *Wood* v. *Moss*, 134 S. Ct. 2056, 2066-2070 (2014); *Stanton* v. *Sims*, 134 S. Ct. 3, 5-7 (2013) (per curiam); *Reichle*, 132 S. Ct. at 2093-2097; *al-Kidd*, 563 U.S. at 741-744.

is to free officials from the concerns of litigation, including avoidance of disruptive discovery") (citation and internal quotation marks omitted).

C. Respondents Have Not Plausibly Alleged That Petitioners Personally Condoned The Implementation Of Facially Constitutional Policies In A Discriminatory Or Unreasonably Harsh Manner

Finally, as the six dissenters concluded (App. 248a-249a) and as Judge Raggi explained at greater length (App. 123a-137a, 149a-157a), the court of appeals did not faithfully apply the pleading standard required by this Court's decision in *Iqbal*. That error, too, warrants further review.

1. Respondents' complaint alleges that Attorney General Ashcroft intended all along for the September 11 investigation to "target[] innocent Muslims and Arabs" and that Director Mueller "knowingly joined" "the Ashcroft sweeps" and "the hold-until-cleared policy." App. 265a (Compl. ¶ 41) (capitalization altered). In their view, only "invidious animus against Arabs and Muslims" would explain the policies under which respondents were detained. App. 272a (Compl. ¶ 60). In *Iqbal*, however, this Court held that similar allegations about the discriminatory purpose of the hold-until-cleared policy and the FBI's arrests were implausible in light of "more likely explanations." 556 U.S. at 681. The "'obvious alternative explanation'" was that the arrests "were likely lawful and justified by [a] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007)). Moreover, the Court concluded that the policy of imposing restrictive conditions of

confinement on September 11 detainees "plausibly suggests" only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

Perhaps because of *Iqbal*, the court of appeals eschewed respondents' theory of liability. It recognized that Ashcroft's "arrest and detention mandate" was facially legitimate and that "the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner." App. 31a. Nevertheless, the court constructed its own theory about how—in light of the ways in which the massive September 11 investigation developed—Ashcroft and Mueller could be deemed to be "responsible for a decision to merge" two lists of detainees and therefore to have "condoned" discriminatory (or unreasonably harsh) treatment of some September 11 detainees. App. 32a-33a, 61a; see App. 32a n.21 (acknowledging that respondents "did not advance the 'lists-merger theory'" in the court of appeals or district court). The court's theory depended on a series of premises: (1) that petitioners made or approved the decision to merge the lists; (2) that they did so after learning that the New York List included some persons who had been detained in connection with the September 11 investigation in part because of their ethnicity or religion but without a determination that there was reason to suspect them of links to terrorism; (3) that they also knew that some (but not most) of the detainees on the New York List were being detained in the ADMAX SHU; and (4) that they further knew that conditions of confinement in the ADMAX SHU were so restrictive that they could not

reasonably be imposed on someone for whom the government lacked individualized suspicion of terrorism connections. App. 31a-48a, 61a-68a. In light of those premises, the court concluded that respondents "have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New York List with the INS List." App. 67a; see also App. 32a-33a (describing similar chain for imputing "punitive intent" to DOJ Defendants for substantive-due-process claim); App. 81a (Section 1985(3) conspiracy claim).

2. The court of appeals' lists-merger theory depends on unsupported speculation at so many steps that it cannot overcome the "obvious" and nondiscriminatory "alternative explanation" that this Court identified in *Iqbal*. 556 U.S. at 682 (citation omitted).

As Judge Raggi explains in her dissent, even after the Inspector General's report, nothing but "pure speculation" (App. 129a) links the Attorney General or the FBI Director to the actual decision to merge the two lists of detainees. App. 124a-129a. Even assuming that petitioners made (or learned about) the lists-merger decision, that would not mean they "intended for [respondents] to be held in the MDC's ADMAX SHU"—especially when the majority of detainees on the New York List were confined in far-less-restrictive conditions at the Passaic County Jail. App. 130a, 152a-153a. Nor is it likely (as opposed to merely possible) that petitioners were made aware of the conditions of confinement at the MDC, App. 132a-135a, or that the regular arrest reports they received would have indicated that some individuals were being detained without any evidence of a potential connection to terrorism despite an INS field order that "discouraged arrest in

cases that were 'clearly of no interest in furthering the investigation,'" App. 17a (majority opinion) (quoting *OIG Report* 45).

Most importantly, even if petitioners could plausibly be thought to have known about the over-inclusiveness of the New York List *and* about the nature of the conditions of confinement at the MDC, that would still not make it likely that the decision to merge the lists was made *because of*, rather than in spite of, the allegedly discriminatory conduct underlying some of the original arrests. The obvious alternative explanation for the merger decision is far simpler: "concern that absent further investigation, 'the FBI could unwittingly permit a dangerous individual to leave the United States,'" App. 19a (quoting *OIG Report* 53)—in other words, the same rationale that this Court has previously concluded was the most likely explanation for the hold-until-cleared policy, see *Iqbal*, 556 U.S. at 683.

3. The court of appeals' chain of speculation and inference is especially troubling here because it operates as an end-run around the limits on supervisory liability. As *Iqbal* explained, an official may be liable under *Bivens* only for "his or her own misconduct." 556 U.S. at 677. Accordingly, "a supervisor's mere knowledge of his subordinate's discriminatory purpose" does not "amount[] to the supervisor's violating the Constitution." *Ibid.* Yet that is effectively what the court of appeals has made the basis of this lawsuit. See, *e.g.*, App. 67a ("[Respondents] have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New York List with the INS List.").

Allowing this damages suit against the former Attorney General and FBI Director to proceed on such terms comes at a substantial cost—one that courts should be especially reluctant to impose in the context of the unprecedented investigation into the September 11 attacks. In such situations, national officeholders should not be "deterred from full use of their legal authority" (*al-Kidd*, 563 U.S. at 747 (Kennedy, J., concurring)) by the prospect of more than a decade of litigation. The decision below warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

IBRAHIM TURKMEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 13-981, 13-999, 13-1002, 13-1003, 13-1662

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY, DEFENDANTS-APPELLANTS

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANTS-CROSS-APPELLEES

SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN, JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT, DEFENDANTS*

Argued: May 1, 2014
Decided: June 17, 2015

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* The Clerk of the Court is directed to amend the caption as set forth above.

Before: POOLER, RAGGI, and WESLEY, Circuit Judges.

POOLER and WESLEY, Circuit Judges:

On September 11, 2001, "19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda" hijacked four airplanes and killed over 3,000 people on American soil. *Ashcroft v. Iqbal* (*Iqbal*), 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). This case raises a difficult and delicate set of legal issues concerning individuals who were caught up in the post-9/11 investigation even though they were unquestionably never involved in terrorist activity. Plaintiffs are eight male, "out-of-status" aliens[1] who were arrested on immigration charges and detained following the 9/11 attacks. Plaintiffs were held at the Metropolitan Detention Center (the "MDC") in Brooklyn, New York, or the Passaic County Jail ("Passaic") in Paterson, New Jersey; their individual detentions generally ranged from approximately three to eight months.

The operative complaint, a putative class action, asserts various claims against former Attorney General John Ashcroft; former Director of the Federal Bureau of Investigation (the "FBI") Robert Mueller; former Commissioner of the Immigration and Naturalization Service (the "INS") James Ziglar; former MDC Warden Dennis

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[1] We use the term "out-of-status" alien to mean one who has either (1) entered the United States illegally and is deportable if apprehended, or (2) entered the United States legally but who has fallen "out of status" by violating the rules or guidelines for his nonimmigrant status (often by overstaying his visa) in the United States and is deportable.

Hasty; former MDC Warden Michael Zenk; and former MDC Associate Warden James Sherman.[2] All claims arise out of allegedly discriminatory and punitive treatment Plaintiffs suffered while confined at the MDC or Passaic.

BACKGROUND

I. Procedural History[3]

Plaintiffs initiated this action over thirteen years ago on April 17, Over the following two and one-half years, Plaintiffs amended their complaint three times. In June 2006, following a series of motions to dismiss, the district court dismissed Plaintiffs' unlawful-length-of-detention claims but permitted to proceed, *inter alia*, the substantive due process and equal protection claims challenging the conditions of confinement at the MDC. *See Turkmen v. Ashcroft* (*Turkmen I*), No. 02 CV 2307(JG), 2006 WL 1662663, at *33-36, 40-41 (E.D.N.Y. June 14, 2006), *aff'd in part, vacated in part, Turkmen v. Ashcroft* (*Turkmen II*), 589 F.3d 542 (2d Cir. 2009) (per curiam), *remanded to Turkmen III*, 915 F. Supp. 2d at 314.

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[2] For ease of reference, we refer to Ashcroft, Mueller, and Ziglar collectively as the "Department of Justice ('DOJ') Defendants," and Hasty, Sherman, and Zenk collectively as the "MDC Defendants." The operative complaint also alleges claims against MDC officials Joseph Cuciti and Salvatore Lopresti. Cuciti did not appeal the district court's decision, and Lopresti filed a notice of appeal but did not timely pay the filing fee or file a brief. Lopresti's appeal was dismissed pursuant to Federal Rule of Appellate Procedure 31(c). Thus, we do not address the claims against Cuciti and Lopresti.

[3] For a more comprehensive review of this case's procedural history, *see Turkmen v. Ashcroft* (*Turkmen III*), 915 F. Supp. 2d 314, 331-33 (E.D.N.Y. 2013).

Plaintiffs and Defendants appealed various aspects of that ruling.

Two significant events occurred while the appeal was pending. First, six of the original eight named Plaintiffs at that time withdrew or settled their claims against the government. *See Turkmen II*, 589 F.3d at 544 n.1, 545. This left only Ibrahim Turkmen and Akhil Sachdeva, both of whom were detained at Passaic, as opposed to the MDC. Second, the Supreme Court issued *Iqbal*, 556 U.S. at 662, 129 S. Ct. 1937, which altered the pleading regime governing Plaintiffs' claims. In light of these events and the remaining Plaintiffs' stated desire to replead claims unique to the settling Plaintiffs, this Court affirmed the dismissal of the length of detention claims but vacated and remanded with respect to the conditions of confinement claims. *See Turkmen II*, 589 F.3d at 546-47, 549-50.

On remand, the district court permitted Plaintiffs to amend their complaint and granted leave for six additional Plaintiffs, all of whom had been held at the MDC, to intervene. The eight current named Plaintiffs are of Middle Eastern, North African, or South Asian origin; six of them are Muslim, one is Hindu, and one is Buddhist. The Fourth Amended Complaint (the "Complaint"), the operative complaint in this case, restates Plaintiffs' putative class claims on behalf of the "9/11 detainees," a class of similarly situated non-citizens who are Arab or Muslim, or were perceived by Defendants as Arab or Muslim, and were arrested and detained in response to the 9/11 attacks.[4]

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[4] Benamar Benatta was originally detained by Canadian authorities on September 5, 2001, after crossing the Canadian border with false documentation. Following the September 11 attacks, Ben-

The Complaint dramatically winnowed the relevant claims and defendants; it alleges seven claims against eight defendants. The first six claims, all brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), are: (1) a conditions of confinement claim under the Due Process Clause; (2) an equal protection claim alleging that Defendants subjected Plaintiffs to the challenged conditions because of their, or their perceived, race, religion, ethnicity, and/or national origin; (3) a claim arising under the Free Exercise Clause; (4) and (5) two claims generally alleging interference with counsel; and (6) a claim under the Fourth and Fifth Amendments alleging unreasonable and punitive strip searches. The seventh and final claim alleges a conspiracy under 42 U.S.C. § 1985(3). The DOJ and MDC Defendants moved to dismiss the Complaint for failure to state a claim, on qualified immunity grounds, and, in some instances, based on a theory that *Bivens* relief did not extend to the claim at issue.

II. The OIG Reports

Plaintiffs supplemented the factual allegations in their amended complaints with information gleaned from two reports by the Office of the Inspector General of the United States Department of Justice (the "OIG reports")[5]

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atta was transported back to the United States and detained in the challenged conditions of confinement and pursuant to the post-9/11 investigation; therefore, we call him a "9/11 detainee."

[5] There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. *See* U.S. Dep't of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investi-

that documented the federal law enforcement response to 9/11 and conditions at the MDC and Passaic.

The OIG reports, which the Complaint "incorporate[s] by reference except where contradicted by the allegations of [the Complaint]," Compl. ¶ 3 n.1, *see also id.* ¶ 5 n.2, play a significant role in this case.[6] Primarily, the OIG reports provide invaluable context for the unprecedented challenges following 9/11 and the various strategies fed-

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gation of the September 11 Attacks (April 2003) (the "OIG Report"), *available at* http://www.justice.gov/oig/special/0306i/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC. *See* U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the "Supplemental OIG Report"), *available at* http://www.justice.gov/oig/special/0312/final.pdf.

[6] Various Defendants challenge the district court's decision to consider the OIG reports to the extent that they are not contradicted by the Complaint. Defendants are correct that a complaint "include[s] any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991); *accord DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). But their objection misses the point. The district court accurately explained that at the pleading stage, although we must consider the words on the page (that is, we cannot disregard the fact that the OIG reports make particular findings), we need not consider the truth of those words to the extent disputed by Plaintiffs. *See Turkmen III*, 915 F. Supp. 2d at 342 n.14 (*citing DiFolco*, 622 F.3d at 111). Even were we to view the OIG reports as fully incorporated, reliance on any assertion of fact requires a credibility assessment that we are fundamentally unsuited to undertake at the Rule 12(b)(6) stage. And although the OIG reports cannot determinatively prove or disprove Plaintiffs' allegations, they remain relevant to our analysis because they supplement our understanding of the law enforcement response to 9/11.

eral agencies employed to confront these challenges. The reports help orient our analysis of the Complaint.

III. Plaintiffs' Allegations[7]

In the aftermath of the 9/11 attacks, the FBI and other agencies within the DOJ immediately initiated an immense investigation aimed at identifying the 9/11 perpetrators and preventing any further attacks. *See* OIG Report at 1, 11-12. PENTTBOM, the Pentagon/Twin Towers Bombings investigation, was initially run out of the FBI's field offices, but shortly thereafter, Mueller ordered that management of the investigation be switched to the FBI's Strategic Information and Operations Center (the "SIOC") at FBI Headquarters in Washington, D.C. Mueller personally directed PENTTBOM from the SIOC and remained in daily contact with FBI field offices.

In conjunction with PENTTBOM, the Deputy Attorney General's Office (the "DAG's Office") established the SIOC Working Group to coordinate "efforts among the various components within the [DOJ] that had an investigative interest in[,] or responsibility for[,] the September 11 detainees." *Id.* at 15.[8] The SIOC Working Group included representatives from, among other agencies, the FBI, the INS, and the DAG's Office. This group met daily—if not multiple times in a single day—in the months following 9/11; its duties included "coordinat[ing] infor-

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[7] The allegations set forth herein are drawn from the Complaint and those portions of the OIG reports incorporated by reference. *See supra* note 6. We presume the veracity of Plaintiffs' well-pleaded allegations. *Iqbal*, 556 U.S. at 679, 129 S. Ct. 1937.

[8] The SIOC Working Group acquired this name because its initial meetings occurred at the FBI's SIOC.

mation and evidence sharing among the FBI, INS, and U.S. Attorneys' offices" and "ensur[ing] that aliens detained as part of the PENTTBOM investigation would not be released until they were cleared by the FBI of involvement with the September 11 attacks or terrorism in general." *Id.*

Given that the 9/11 hijackers were all foreign nationals, the DOJ response carried a major immigration law component. *See id.* at 12. Ashcroft and Mueller developed "a policy whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation . . . and discovered to be a non-citizen who had violated the terms of his visa, was arrested." Compl. ¶ 1; *see also id.* ¶¶ 39-49. Ashcroft also created the related "hold-until-cleared" policy, which mandated that individuals arrested in the wake of 9/11 not be released from "custody until [FBI Headquarters] affirmatively cleared them of terrorist ties." *Id.* ¶ 2; *see also* OIG Report at 38-39.

Within a week of 9/11, the FBI had received approximately 96,000 tips from civilians across the country. These tips varied significantly in quality and reliability.[9]

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[9] For instance, Turkmen came to the FBI's attention when his landlord called the FBI's 9/11 hotline and reported "that she rented an apartment in her home to several Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.'" Compl. ¶ 251. "The FBI knew that her only basis for suspecting these men was that they were Middle Eastern; indeed, she reported that they were good tenants, and paid their rent on time." *Id.* Another alien was arrested after the FBI received a tip that stated that the small grocery store where he worked was overstaffed, thus arousing the tipster's suspicions about the "Middle Eastern men" that worked there. OIG Report at 17.

"Mueller [nonetheless] ordered that every one of these tips be investigated, even if they were implausible on their face." Compl. ¶ 40. Ultimately, 762 detainees were placed on the INS Custody List (the "INS List") that then made them subject to Ashcroft's hold-until-cleared policy.

In the months following 9/11, the DOJ Defendants "received detailed daily reports of the arrests and detentions." *Id.* ¶ 47. Ashcroft and Mueller also "met regularly with a small group of government officials in Washington, D.C., and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation." *Id.* ¶ 61.[10] This small group "discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings. The group also decided to spread the word among law enforcement personnel that the 9/11 detainees were suspected terrorists[ ] . . . and that they needed to be encouraged in any way possible to cooperate." *Id.*

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[10] It is unclear whether this "small group" refers to the SIOC Working Group or a distinct group involving Ashcroft, Mueller, and other senior Washington, D.C., officials. One possibility is that Plaintiffs are referring to the small group that consisted of Ashcroft, Mueller, Michael Chertoff, who was then Assistant Attorney General of the Criminal Division, and the Deputy Attorney General. *See* OIG Report at 13. According to Chertoff, this group discussed the DOJ's post-9/11 law enforcement strategy and policies. Given the makeup of this group and the SIOC Working Group, it is reasonable to infer that information flowed between them; for instance, Chertoff's deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division and personally established the SIOC Working Group.

Plaintiffs, with the exception of Turkmen and Sachdeva, were held at the MDC. Under MDC confinement policy, the 9/11 detainees placed in the MDC were held in the MDC's Administrative Maximum Special Housing Unit (the "ADMAX SHU")—"a particularly restrictive type of SHU not found in most [Bureau of Prisons ('BOP')] facilities because the normal SHU is usually sufficient for correcting inmate misbehavior and addressing security concerns." *Id.* ¶ 76. The confinement policy was created by the MDC Defendants "in consultation with the FBI." *Id.* ¶ 65.

Conditions in the ADMAX SHU were severe and began to receive media attention soon after detentions began. *See* OIG Report at 2, 5. Detainees were: "placed in tiny cells for over 23 hours a day," Compl. ¶ 5; "strip-searched every time they were removed from or returned to their cell[s], . . . even when they had no conceivable opportunity to obtain contraband," *id.* ¶ 112; provided with "meager and barely edible" food, *id.* ¶ 128; denied sleep by "bright lights" that were left on in their cells for 24 hours a day, *id.* ¶ 119, and, "[o]n some occasions, correctional officers walked by every 20 minutes throughout the night, kicked the doors to wake up the detainees, and yelled" highly degrading and offensive comments, *id.* ¶ 120; constructively denied recreation and exposed to the elements, *see id.* ¶¶ 122-23; "denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, [and] eating utensils," *id.* ¶ 130; and prohibited from moving around the unit, using the telephone freely, using the commissary, or accessing MDC handbooks, which explained how to file complaints about mistreatment, *see id.* ¶¶ 76, 83, 129, 140.

MDC staff also subjected the 9/11 detainees to frequent physical and verbal abuse. The abuse included slamming the 9/11 detainees into walls; bending or twisting their arms, hands, wrists, and fingers; lifting them off the ground by their arms; pulling on their arms and handcuffs; stepping on their leg restraints; restraining them with handcuffs and/or shackles even while in their cells; and handling them in other rough and inappropriate ways. *See id.* ¶ 105; *see also* Supplemental OIG Report at 8-28. MDC staff also referred to the 9/11 detainees as "'terrorists,' and other offensive names; threaten[ed] them with violence; curs[ed] at them; insult[ed] their religion; and ma[de] humiliating sexual comments during strip-searches." Compl. ¶ 109. Specifically, Plaintiffs and putative class members at the MDC were referred to by staff as "camel[s]," "fucking Muslims," and "Arabic asshole[s]," *id.* ¶¶ 110, 147, 218.

The MDC Plaintiffs did not receive copies of the Koran for weeks or months after requesting them, and one Plaintiff never received a copy, "pursuant to a written MDC policy . . . that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell[s]." *Id.* ¶ 132. The MDC Plaintiffs were also "denied the Halal food required by their Muslim faith." *Id.* ¶ 133. And "MDC staff frequently interrupted Plaintiffs' and class members' prayers," including "by banging on cell doors," yelling derogatory comments, and mocking the detainees while they prayed. *Id.* ¶ 136.

The named MDC Plaintiffs' individual experiences—several of which are highlighted below—add further texture to their collective allegations concerning the arrest and confinement of the 9/11 detainees.

A. Anser Mehmood

Mehmood, a citizen of Pakistan and devout Muslim, entered the United States on a business visa in 1989 with his wife, Uzma, and their three children. After his visa expired, Mehmood remained in the country and started a trucking business that provided enough earnings to purchase a home in New Jersey and to send funds to his family in Pakistan. In 2000, while living in New Jersey, he and Uzma had their fourth child. In May 2001, Uzma's brother—a United States citizen—submitted an immigration petition for the entire family.

On the morning of October 3, 2001, Mehmood was asleep with Uzma and their one-year-old son when FBI and INS agents knocked on his door. The agents searched Mehmood's home and asked whether he "was involved with a jihad." *Id.* ¶ 157. Mehmood admitted that he had overstayed his visa. The FBI informed Mehmood that they were not interested in him; they had come to arrest his wife Uzma, whose name the FBI had encountered when investigating Plaintiff Ahmer Abbasi, her brother. Mehmood convinced the FBI to arrest him instead of Uzma because their son was still breastfeeding. "The Agent told Mehmood that they had no choice but to arrest one of the parents, but that Mehmood faced a minor immigration violation only, and he would be out on bail within days." *Id.* ¶ 159.

Upon his arrival at the MDC, Mehmood "was dragged from the van by several large correctional officers, who threw him into several walls on his way into the facility." *Id.* ¶ 162. "His left hand was broken during this incident" and "[t]he guards threatened to kill him if he asked any questions." *Id.* His experience in the ADMAX SHU tracked that of other 9/11 detainees. For instance,

"[w]henever Mehmood was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by banging him into the wall, dragging him, carrying him, and stepping on his shackles and pushing his face into the wall." *Id.* ¶ 166. Neither the FBI nor INS interviewed Mehmood following his arrest. Mehmood was not released from the ADMAX SHU until February 6, 2002.

B. Ahmed Khalifa

Khalifa, who had completed five years toward a medical degree at the University of Alexandria in Egypt, came to the United States on a student visa in July 2001. He came to the FBI's attention after the FBI received a tip that "several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money." *Id.* ¶ 195. On September 30, 2001, FBI, INS, and officers from the New York City Police Department came to the apartment Khalifa shared with several Egyptian friends. The officers searched his wallet and apparently became "very interested in a list of phone numbers of friends in Egypt." *Id.* ¶ 196. After searching the apartment, the agents asked Khalifa for his passport and "if he had anything to do with September 11." *Id.* ¶ 197. One FBI agent told Khalifa that they were only interested in three of his roommates, but another agent said they also needed Khalifa, whom they arrested for "working without authorization." *Id.*

On October 1, 2001, after briefly stopping at a local INS detention facility to complete paperwork, Khalifa and his roommates were transported to the MDC. When he arrived at the MDC, Khalifa "was slammed into the

wall, pushed and kicked by MDC officers and placed into a wet cell, with a mattress on the floor." *Id.* ¶ 201. "[His] wrists were cut and bruised from his handcuffs, and he was worried about other detainees, whom he heard gasping and moaning through the walls of his cell." *Id.*

FBI and INS agents interviewed Khalifa on October 7, 2001. One of the agents apologized to Khalifa after noticing the bruises on his wrists. When Khalifa stated that MDC guards were abusing him, the agents "stated it was because he was Muslim." *Id.* ¶ 202. In notes from the interview, the agents did not question Khalifa's credibility, and noted no suspicion of ties to terrorism or interest in him in connection with PENTTBOM.

Following the interview, MDC guards strip searched Khalifa and "laughed when they made him bend over and spread his buttocks." *Id.* ¶ 203. Khalifa complains of the conditions associated with detention in the ADMAX SHU, including arbitrary and abusive strip searches, sleep deprivation, constructive denial of recreational activities and hygiene items, and deprivation of food and medical attention.

By November 5, 2001, the New York FBI field office affirmatively cleared Khalifa of any ties to terrorism and sent his name to FBI Headquarters for final clearance. Khalifa was not officially cleared until December 19, 2001. He remained confined in the ADMAX SHU until mid-January 2002.

C. Purna Raj Bajracharya

Bajracharya is neither Muslim nor Arab. He is a Buddhist and native of Nepal who entered the United States on a three-month business visa in 1996. After overstaying his visa, Bajracharya remained in Queens,

New York, for five years, working various odd jobs to send money home to his wife and sons in Nepal. Having planned to return home in the fall or winter of 2001, Bajracharya used a video camera to capture the streets he had come to know in New York. He came to the FBI's attention on October 25, 2001, when a Queens County District Attorney's Office employee "observed an '[A]rab male' videotaping outside a Queens[ ] office building that contained the Queens County District Attorney['s] Office and a New York FBI office." *Id.* ¶ 230. When approached by investigators from the District Attorney's Office, Bajracharya tried to explain that he was a tourist. The investigators took him inside the building and interrogated him for five hours. FBI and INS agents arrived at some point during the interrogation. Bajracharya subsequently took the agents to his apartment; provided them with his identification documents, which established his country of origin; and admitted to overstaying his visa.

Apparently due to the videotaping, Bajracharya was designated as being of "special interest" to the FBI and on October 27, 2001, he was transported to the MDC. *Id.* ¶¶ 233-34. On October 30, 2001, the FBI agent assigned to Bajracharya's case, along with other law enforcement personnel, interviewed him with the aid of an interpreter. During the interview, "Bajracharya was asked whether he was Muslim or knew any Muslims." *Id.* ¶ 235. Bajracharya explained that he was not Muslim and knew no Muslims. The FBI agent's notes from the interview do not question Bajracharya's credibility or express any suspicion of ties to terrorism. Two days later, the same agent affirmatively cleared Bajracharya of any link to terrorism. By November 5, 2001, the New York FBI field office completed its investigation and forwarded Bajracharya's case to FBI Headquarters for final clear-

ance. Documents at FBI Headquarters note that the FBI had no interest in Bajracharya by mid-November 2001. Nonetheless, he was not released from the ADMAX SHU until January 13, 2002. The FBI agent assigned to Bajracharya's case did not understand why Bajracharya remained in the ADMAX SHU throughout this period; the agent eventually called the Legal Aid Society and advised an attorney that Bajracharya needed legal representation.

Bajracharya, who is 5'3" and weighed about 130 pounds at the time of his arrest, complains of the same conditions common to the other MDC Plaintiffs. For instance, he could not sleep due to the light in his cell, and when he was removed from his cell, he would be placed in handcuffs, chains, and shackles and escorted by four or more MDC staff members. Bajracharya became so traumatized by his experience in the ADMAX SHU that he wept constantly. When an attorney requested that the MDC transfer Bajracharya to general population, an MDC "doctor responded that Bajracharya was crying too much, and would cause a riot." *Id.* ¶ 241.

IV. The New York List and the "Of Interest" Designation

As originally articulated by Ashcroft, following 9/11, the DOJ sought to prevent future terrorism by arresting and detaining those people who "have been identified as persons who participate in, or lend support to, terrorist activities." OIG Report at 12 (internal quotation marks omitted). To that end, Michael Pearson, who was then INS Executive Associate Commissioner for Field Operations, issued a series of Operational Orders, which addressed the responsibilities of INS agents operating with the FBI to investigate leads on illegal aliens. A September 22, 2001 order instructed agents to "exercise

sound judgment" and to limit arrests to those aliens in whom the FBI had an "interest" and discouraged arrest in cases that were "clearly of no interest in furthering the investigation of the terrorist attacks of September 11th." *Id.* at 45 (internal quotation marks omitted). The "of interest" designation by an FBI agent had significant implications for a detainee. "Of interest" detainees were placed on the INS List, subject to the hold-until-cleared policy, and required FBI clearance of any connection to terrorism before they could be released or removed from the United States. Detainees who were not designated "of interest" to the FBI's PENTTBOM investigation were not placed on the INS List, did not require clearance by the FBI, and could be processed according to normal INS procedures. *Id.* at 40.

The arrest and detention mandate was not uniformly implemented throughout the country. Specifically, the New York FBI investigated all PENTTBOM leads without vetting the initial tip and designated as "of interest" "anyone picked up on a PENTTBOM lead . . . regardless of the strength of the evidence or the origin of the lead." *Id.* at 41; *see also* Compl. ¶¶ 43-45. For instance, days after 9/11, New York City police stopped three Middle Eastern men in Manhattan on a traffic violation and found plans to a public school in the car. The next day, their employer confirmed that the men had the plans because they were performing construction work on the school. Nonetheless, the men were arrested and detained. *See* OIG Report at 42. In another instance, a Middle Eastern man was arrested for illegally crossing into the United States from Canada over a week before 9/11. After the attacks, the man was placed on New York's "'special interest' list even though a document in his file, dated September 26, 2001, stated that FBI New

York had no knowledge of the basis for his detention." *Id.* at 64 (internal quotation marks omitted).

In many cases, the New York FBI did not even attempt to determine whether the alien was linked to terrorism, *see id.* at 14, 16, 41-42, 47, and it "never labeled a detainee 'no interest' until *after* the clearance process was complete," *id.* at 18 (emphasis added). Thus, aliens encountered and arrested pursuant to a PENTTBOM lead in New York were designated "of interest" (or special interest) and held until the local field office confirmed they had no ties to terrorism. *Id.* at 14; *see also id.* at 53.[11] The result was that the MDC Plaintiffs and others similarly situated in New York were held at the MDC ADMAX SHU as if they met the national "of interest" designation. These practices—specifically the absolute lack of triage—appear to have been unique to New York. *See id.* at 47, 56.[12]

At some point in October 2001, INS representatives to the SIOC Working Group learned that the New York FBI was maintaining a separate list (the "New York List") of detainees who had not been included in the national INS List. One explanation for maintaining a separate New York List was that the New York FBI could not determine

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[11] The OIG Report indicates that 491 of the 762 detainees were arrested in New York. OIG Report at 21-22. However, the OIG Report does not identify how many New York arrests were the result of the New York FBI's efforts.

[12] The OIG Report posits that the New York response differed from the rest of the nation, at least in part, as a result of the New York FBI and U.S. Attorney's Office's long tradition of independence from their headquarters in Washington, D.C. *See* OIG Report at 54.

if the detainees had any connection with terrorist activity. *Id.* at 54.

After INS Headquarters learned of the separate New York List, small groups of senior officials from the DAG's Office, the FBI, and the INS convened on at least two occasions in October and November 2001 to suggest how to deal with the two separate lists of detainees. In discussing how to address the New York List, "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens [on the New York List] had any nexus to terrorism." *Id.* at 53. Nonetheless, this list was merged with the INS List due to the concern that absent further investigation, "the FBI could unwittingly permit a dangerous individual to leave the United States." *Id.* The decision to merge the lists ensured that some of the individuals on the New York List would remain detained in the challenged conditions of confinement as if there were some suspicion that those individuals were tied to terrorism, even though no such suspicion existed.

V. The Issues on Appeal

In a January 15, 2013 Memorandum and Order, the district court granted in part and denied in part Defendants' motions to dismiss the Complaint. The district court dismissed all claims against the DOJ Defendants. As to the MDC Defendants, the district court denied their motions to dismiss Plaintiffs' substantive due process conditions of confinement claim (Claim 1); equal protection conditions of confinement claim (Claim 2); free exercise claim (Claim 3); unreasonable strip search claim (Claim 6); and conspiracy claim under 42 U.S.C. § 1985(3) (Claim 7). *See Turkmen III*, 915 F. Supp. 2d at 324. The MDC Defendants appealed, and Plaintiffs cross-appealed the dismissal of the claims against the DOJ Defendants

based on a judgment that was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[13]

DISCUSSION[14]

I. Pleading Standard

To satisfy *Iqbal's* plausibility standard, Plaintiffs must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678, 129 S. Ct. 1937. Although plausibility is not a "probability requirement," Plaintiffs must allege facts that permit "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). Factual allegations that are "merely consistent with" unlawful conduct do not create a reasonable inference of liability. *Id.*

Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Well-pleaded factual allegations, in contrast, should be presumed true, and we must determine "whether they plausibly give rise to an entitlement to relief." *Id.* at 679, 129 S. Ct. 1937. Ultimately, every plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

With the exception of the Section 1985 conspiracy claim, all of Plaintiffs' claims allege constitutional violations based on injuries first recognized by the Supreme

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[13] Plaintiffs have not appealed the district court's dismissal of their interference with counsel claims (Claims 4 and 5).

[14] We review the district court's determination of Defendants' Rule 12(b)(6) motions to dismiss de novo. *See Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 88 (2d Cir. 2011).

Court in *Bivens*, 403 U.S. at 388, 91 S. Ct. 1999. During the course of this litigation, the Supreme Court made it clear in *Iqbal* that a federal tortfeasor's *Bivens* liability cannot be premised on vicarious liability. 556 U.S. at 676, 129 S. Ct. 1937. Thus, Plaintiffs must plausibly plead that each Defendant, "through the official's own individual actions," violated Plaintiffs' constitutional rights. *Id.* In other words, *Bivens* relief is available only against federal officials who are personally liable for the alleged constitutional tort. *Id.* at 676-77, 129 S. Ct. 1937. *Iqbal* precludes relying on a supervisor's mere knowledge of a subordinate's mental state (*i.e.*, discriminatory or punitive intent) to infer that the supervisor shared that intent. *Id.* at 677, 129 S. Ct. 1937. not enough. But that is not to say that where the supervisor condones or ratifies a subordinate's discriminatory or punitive actions the supervisor is free of *Bivens's* reach. *See id.* at 683, 129 S. Ct. 1937.

II. Availability of a *Bivens* Remedy for Plaintiffs' Claims

Unlike the MDC Defendants, none of the DOJ Defendants challenge the existence of a *Bivens* remedy in their briefs to this Court. While the DOJ Defendants did raise this issue below, and are represented by able counsel on appeal, they have chosen to not offer that argument now as a further defense of their victory in the district court. However, as the reader will later discover, our dissenting colleague makes much of this defense, raising it as her main objection to our resolution of the appeal. Given the MDC Defendants' arguments, as well as the dissent's decision to press the issue, legitimately noting that a district court's judgment can be affirmed on any ground supported by the record, Dissenting Op., *post* at 225 n.4 (citing *Lotes Co. v. Hon Hai Precision Indus. Co.*,

753 F.3d 395, 413 (2d Cir. 2014)), we think it appropriate to explain our conclusion that a *Bivens* remedy is available for the MDC Plaintiffs' punitive conditions of confinement and strip search claims against both the DOJ and the MDC Defendants.

In *Bivens*, 403 U.S. at 388, 91 S. Ct. 1999, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Id.* at 70, 122 S. Ct. 515. Because a *Bivens* claim has judicial parentage, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (internal quotation marks omitted). Thus, a *Bivens* remedy is not available for all who allege injury from a federal officer's violation of their constitutional rights.

In *Arar*, we outlined a two-step process for determining whether a *Bivens* remedy is available. First, the court must determine whether the underlying claims extend *Bivens* into a "new context." *Id.* at 572. If, and only if, the answer to this first step is yes, the court must then consider (a) "whether there is an alternative remedial scheme available to the plaintiff," and, even if there is not, (b) "whether special factors counsel hesitation in creating a *Bivens* remedy." *Id.* (internal quotation marks and brackets omitted). As *Arar* noted, case law provides limited guidance regarding how to determine whether a claim presents a new context for *Bivens* purposes. Thus, "[w]e construe[d] the word 'context' as it is commonly

used in law: to reflect a potentially recurring scenario that has similar legal and factual components." *Id.*

Determining the "context" of a claim can be tricky. The MDC Defendants contend that the context of Plaintiffs' claims is the nation's "response to an unprecedented terrorist attack." Sherman Br. 45. The DOJ Defendants made a similar argument before the district court in an earlier round of this litigation. *See Turkmen I*, 2006 WL 1662663, at *30. The MDC Defendants, and the dissent on behalf of the DOJ Defendants, contend that *Arar* supports this view. But if that were the case, then why did *Arar* take pains to note that the "context" of Arar's claims was not the nation's continuing response to terrorism, but the acts of federal officials in carrying out Arar's extraordinary rendition? 585 F.3d at 572. We looked to both the rights injured and the mechanism of the injury to determine the context of Arar's claims. In rejecting the availability of a *Bivens* remedy, we focused on the *mechanism* of his injury: extraordinary rendition —"a distinct phenomenon in international law"—and determined this presented a new context for *Bivens*-based claims. *Id.* Only upon concluding that extraordinary rendition presented a new context did we examine the policy concerns and competing remedial measures available to Arar. In our view, setting the context of the *Bivens* claims here as the national response in the wake of 9/11 conflates the two-step process dictated by this Court in *Arar*. The reasons why Plaintiffs were held at the MDC as if they were suspected of terrorism do not present the "context" of their confinement—just as the reason for Arar's extraordinary rendition did not present the context of his claim. Without doubt, 9/11 presented unrivaled challenges and severe exigencies—but that does not change the "context" of Plaintiffs' claims. "[M]ost of

the rights that the Plaintiff[s] contend[ ] were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal v. Hasty* (*Hasty*), 490 F.3d 143, 159 (2d Cir. 2007), *rev'd on other grounds sub nom. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937.

Thus, we think it plain that the MDC Plaintiffs' conditions of confinement claims are set in the following context: federal detainee Plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions. This context takes account of both the rights injured (here, substantive due process and equal protection rights)[15] and the mechanism of in-

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[15] The rights-injured component of Plaintiffs' claims fall within a recognized *Bivens* context. This Circuit has presumed the availability of a *Bivens* remedy for substantive due process claims in several cases. *See Arar*, 585 F.3d at 598 (Sack, J., dissenting) (citing cases). In addition, the Supreme Court has acknowledged the availability of "a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Iqbal*, 556 U.S. at 675, 129 S. Ct. 1937 (citing *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)). And while it is true that the Supreme Court has subsequently declined to extend *Davis* to other employment discrimination claims, such as in *Chappell v. Wallace*, 462 U.S. 296, 300-04, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983), the Court's analysis was focused on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury. Here, where the mechanism of injury is also familiar, a *Bivens* remedy is plainly available.

jury (punitive conditions without sufficient cause). The claim—that individual officers violated detainees' constitutional rights by subjecting them to harsh treatment with impermissible intent or without sufficient cause—stands firmly within a familiar *Bivens* context. Both the Supreme Court and this Circuit have recognized a *Bivens* remedy for constitutional challenges to conditions of confinement. In *Carlson v. Green*, 446 U.S. 14, 17-20, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), the Supreme Court recognized an implied remedy for the plaintiff's claim alleging an Eighth Amendment violation for prisoner mistreatment. Furthermore, in *Malesko*, in refusing to extend a *Bivens* remedy to claims against private corporations housing federal detainees, the Supreme Court observed in dicta that, while no claim was available against the *private corporation*, a federal prisoner would have a remedy against *federal officials* for constitutional claims. 534 U.S. at 72, 122 S. Ct. 515. "If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Id.* The Court went on to recognize that the "prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP." *Id.* The MDC Plaintiffs' claims here plainly follow *Malesko's* guidance: the claims are raised against the individual officers, both at the DOJ and the MDC, who were responsible for subjecting the Plaintiffs to punitive conditions of confinement.

The Second Circuit has also recognized the availability of *Bivens* relief for federal prisoners housed in federal facilities bringing claims against individual federal officers. In *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006), this Court reversed the district court's dismissal of

the prisoner plaintiff's *Bivens* claim for violation of his due process rights against supervisory prison officials. *See also Tellier v. Fields*, 280 F.3d 69, 80-83 (2d Cir. 2000) (recognizing a *Bivens* remedy for a claim of deprivation of procedural due process brought by a federal prisoner against federal prison officials). Furthermore, in *Hasty*, where we considered claims nearly identical to those at issue in this case, we "did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of the *Bivens* doctrine." *Arar*, 585 F.3d at 597 (Sack, J., dissenting) (discussing *Hasty*, 490 F.3d at 177-78).

Our sister circuits have also permitted *Bivens* claims for unconstitutional conditions of confinement. In *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), *abrogated on other grounds by Thaddeus—X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc), the Sixth Circuit held that "federal courts have the jurisdictional authority to entertain a *Bivens* action brought by a federal prisoner, alleging violations of his right to substantive due process." The Third Circuit has also permitted a federal inmate to bring a civil rights action against prison officials. *See Bistrian v. Levi*, 696 F.3d 352, 372-75 (3d Cir. 2012) (assuming availability of a *Bivens* remedy for plaintiff's Fifth Amendment substantive due process and other constitutional claims challenging his conditions of confinement).

Notwithstanding the persuasive precedent suggesting the availability of a *Bivens* remedy for the MDC Plaintiffs' conditions of confinement claims, the MDC Defendants, and our dissenting colleague, argue that the MDC Plaintiffs' claims present a new *Bivens* context because the Plaintiffs are illegal aliens. But because the MDC Plaintiffs' right to be free from punitive conditions of con-

finement is coextensive with that of a citizen, their unlawful presence in the United States at the time of the challenged confinement does not place their standard mistreatment claim into a new context. Indeed, the Fifth Circuit has recognized a *Bivens* claim raised by a Mexican national for violations of her Fourth and Fifth Amendment rights to be free from false imprisonment and the use of excessive force by law enforcement personnel. *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006). The Ninth Circuit has also recognized a *Bivens* claim for due process violations that occurred during an illegal alien plaintiff's detention. *See Papa v. United States*, 281 F.3d 1004, 1010-11 (9th Cir. 2002).[16] Thus, we conclude that a *Bivens* remedy is available for the Plaintiffs' substantive due process and equal protection conditions of confinement claims.

Our understanding of *Bivens* and this Court's decision in *Arar* do not however suggest the availability of a *Bivens* remedy for the Plaintiffs' free exercise claim. That claim—that Defendants deliberately interfered with Plaintiffs' religious practices by: (1) denying them timely access to copies of the Koran; (2) denying them Halal food; and (3) failing to stop MDC staff from interfering with Plaintiffs' prayers—does not fall within a familiar *Bivens* context. Here, it is the right injured— Plaintiffs' free exercise right—and not the mechanism of injury that places Plaintiffs' claims in a new *Bivens* context. Indeed,

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[16] We note that the Ninth Circuit has declined to provide illegal aliens with an implied *Bivens* remedy for *unlawful detention* during deportation proceedings. *Mirmehdi v. United States*, 689 F.3d 975, 981-83 (9th Cir. 2012). Of course, that decision is plainly inapposite here where the MDC Plaintiffs do not challenge the fact that they were detained, but rather the conditions in which they were detained.

the Supreme Court has "not found an implied damages remedy under the Free Exercise Clause" and has "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 556 U.S. at 675, 129 S. Ct. 1937 (citing *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)). Accordingly, we agree with the MDC Defendants that Plaintiffs' free exercise claim should have been dismissed.

But the MDC Plaintiffs' claim that they were subjected to unlawful strip searches falls within an established *Bivens* context: federal detainee plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to unreasonable searches in violation of the Fourth Amendment. The MDC Defendants fail to persuasively explain why recognizing the MDC Plaintiffs' unlawful strip search claim would extend *Bivens* to a new context. Indeed, the right violated certainly falls within a recognized *Bivens* context: the Fourth Amendment is at the core of the *Bivens* jurisprudence, as *Bivens* itself concerned a Fourth Amendment claim. In *Bivens*, the plaintiff brought a Fourth Amendment claim for the defendants' use of unreasonable force without probable cause, resulting in the plaintiff's unlawful arrest. 403 U.S. at 389-90, 91 S. Ct. 1999; *see also Groh v. Ramirez*, 540 U.S. 551, 555, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (recognizing the availability of a *Bivens* remedy for a Fourth Amendment claim of an unreasonable search, as a result of a facially invalid warrant). This Circuit has also permitted *Bivens* relief for Fourth Amendment claims involving unreasonable searches. *See, e.g., Castro v. United States*, 34 F.3d 106, 107 (2d Cir. 1994). And the mechanism of the violation—here, an unreasonable search performed by a prison official—has also been recognized by this Circuit. Indeed, in *Arar*, we stated that

"[i]n the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued. . . . [T]he immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes." 585 F.3d at 580; *see also Hasty*, 490 F.3d at 170-73 (assuming the existence of a *Bivens* remedy to challenge strip searches under the Fourth Amendment).

Accordingly, we conclude that a *Bivens* remedy is available for Plaintiffs' conditions of confinement claims, under both the Due Process and Equal Protection Clauses of the Fifth Amendment, and Fourth Amendment unreasonable and punitive strip searches claim.[17] However, Plaintiffs' free exercise claim would require extending *Bivens* to a new context, a move we decline to make absent guidance from the Supreme Court.

III. Claim 1: Substantive Due Process Conditions of Confinement

The MDC Plaintiffs allege that the harsh conditions of confinement in the MDC violated their Fifth Amendment substantive due process rights and that all De-

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[17] Because we conclude that Plaintiffs' substantive due process, equal protection, and unreasonable punitive strip searches claims do not extend *Bivens* to a new context, we need not address "whether there is an alternative remedial scheme available to the plaintiff" or "whether special factors counsel hesitation in creating a *Bivens* remedy." *Arar*, 585 F.3d at 572 (internal quotation marks and brackets omitted).

fendants are liable for this harm.[18] Plaintiffs present distinct theories of liability as to the DOJ and MDC Defendants.

A. Applicable Legal Standard

The Fifth Amendment's Due Process Clause forbids subjecting pretrial detainees to punitive restrictions or conditions. *See Bell v. Wolfish* (*Wolfish*), 441 U.S. 520, 535 & n.16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).[19] Plaintiffs must plausibly plead that Defendants, (1) with punitive intent, (2) personally engaged in conduct that caused the challenged conditions of confinement. *See id.* at 538, 99 S. Ct. 1861; *see also Iqbal*, 556 U.S. at 676-77, 129 S. Ct. 1937. Absent "an expressed intent to punish," *Wolfish*, 441 U.S. at 538, 99 S. Ct. 1861, we may only infer that Defendants acted with punitive intent if the challenged conditions were "not reasonably related to a legitimate goal—if [they were] arbitrary or purposeless," *id.* at 539, 99 S. Ct. 1861.

B. The DOJ Defendants

While the DOJ Defendants do not raise a no-*Bivens*-claim defense, they do forcefully contest liability here with powerful post-*Iqbal* assertions that "the former Attorney General and FBI Director did not themselves require or specify any of the particular conditions set

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[18] Turkmen and Sachdeva, the Passaic Plaintiffs, do not bring a substantive due process conditions of confinement claim or unreasonable strip search claim (Claims 1 and 6).

[19] The parties have not argued for a different standard in this appeal. Accordingly, we do not address whether the rights of civil immigration detainees should be governed by a standard that is even more protective than the standard that applies to pretrial criminal detainees.

forth in the complaint. And they cannot be held liable on what amounts to a theory of *respondeat superior* for the actions of others who may have imposed those conditions." Ashcroft & Mueller Br. 10. They contend that because the former Attorney General's initial detention order was constitutional, having been approved by the Supreme Court in *Iqbal*, the DOJ Defendants were "entitled to presume that the facially constitutional policy would in turn be implemented lawfully. . . ." *Id.* at 9. We agree . . . to a point.

The MDC Plaintiffs concede that the DOJ Defendants did not create the particular conditions in question. *See Turkmen III*, 915 F. Supp. 2d at 326 n.4; *see also* OIG Report at 19, 112-13 (reporting that, at least initially, BOP officials determined the conditions under which detainees would be held, without direction from the FBI or elsewhere). The MDC Plaintiffs similarly fail to plead that Ashcroft's initial arrest and detention mandate required subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism. Given the mandate's facial validity, the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner. *See Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1065-66 (2d Cir. 1989). But that is not the end of the matter.

The MDC Plaintiffs plausibly plead that the DOJ Defendants were aware that illegal aliens were being detained in punitive conditions of confinement in New York and further knew that there was no suggestion that those detainees were tied to terrorism except for the fact that

they were, or were perceived to be, Arab or Muslim.[20] The MDC Plaintiffs further allege that while knowing these facts, the DOJ Defendants were responsible for a decision to merge the New York List with the national INS List, which contained the names of detainees whose detention was dependent not only on their illegal immigrant status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities. The merger ensured that the MDC Plaintiffs would continue to be confined in punitive conditions. This is sufficient to plead a Fifth Amendment substantive due process violation.[21] Given the lack of

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[20] The dissent counters that "[t]his is not apparent in the record," citing Plaintiff Bajracharya's videotaping of a building in Queens as evidence of that Plaintiff's possible tie to terrorism. Dissenting Op., *post* at 283 n.28. The dissent makes no mention, of course, of Plaintiff Khalifa, who was told that the FBI was only interested in his roommates, but who was arrested and then detained in the ADMAX SHU anyway, Compl. ¶ 197; or of Plaintiff Mehmood, who was arrested and detained in the ADMAX SHU in place of his wife, in whom the FBI had apparently expressed interest, but who was still breastfeeding their son, *id.* ¶ 159. The dissent further claims that detainees were not sent to the ADMAX SHU based on their perceived race or religion, but—as the OIG Report states—based on whether they were designated of "high interest" to the PENTTBOM investigation. Dissenting Op., *post* at 283 n.28 (citing OIG Report at 18, 111). But, as the dissent concedes, *id.*, Plaintiffs' well-pleaded Complaint specifically contradicts this point: the MDC Plaintiffs were detained in the ADMAX SHU "even though they had not been classified 'high interest,'" Compl. ¶ 4.

[21] We acknowledge, as the dissent points out, that the MDC Plaintiffs did not advance the "lists-merger theory" before this Court or the district court. Dissenting Op., *post* at 283 n.28. Rather, they structured the Complaint to challenge Ashcroft's arrest and detention mandate as initially formulated and generally applied. In examining the Complaint's sufficiency, we have been

individualized suspicion, the decision to merge the lists was not "reasonably related to a legitimate goal." *See Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861. The only reason why the MDC Plaintiffs were held as if they were suspected of terrorism was because they were, or appeared to be, Arab or Muslim. We conclude that this plausibly pleads punitive intent. *Id.*

1. *Punitive Conditions of Confinement*

Contrary to the district court's conclusion that Plaintiffs failed to "allege that the DOJ [D]efendants were even aware of [the] conditions," *Turkmen III*, 915 F. Supp. 2d at 340, the Complaint and the OIG Report each contain allegations of the DOJ Defendants' knowledge of the challenged conditions. Plaintiffs allege, *inter alia*, that Mueller ran the 9/11 investigation out of FBI Headquarters; and that "Ashcroft, Mueller[,] and Ziglar received detailed daily reports of the arrests and detentions," Compl. ¶ 47; *see also id.* ¶¶ 63-65.

The OIG Report makes plain the plausibility of Plaintiffs' allegations. The "[DOJ] was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities." OIG Report at 19. The Deputy Chief of Staff to Ashcroft told the OIG that an allegation of mistreatment was called to the Attorney General's attention. *Id.* at 20. And BOP Director Kathy Hawk Sawyer stated that in the weeks following 9/11, the Deputy Attorney General's Chief of Staff and

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clear that the pleadings are inadequate to challenge the validity of the policy *ab initio*, but do state a claim with regard to the merger decision, an event that Plaintiffs explicitly reference in the Complaint. *See* Compl. ¶ 47; Pls.' Br. 38. Sufficiency analysis requires a careful parsing of the Complaint and that is all that has occurred here.

the Principal Associate Deputy Attorney General "called her . . . with concerns about detainees' ability to communicate both with those outside the facility and with other inmates," *id.* at 112, which she said confirmed for her that the decision to house detainees in the restrictive conditions of the ADMAX SHU was appropriate, *id.* at 112-113. This supports the reasonable inference that not only was Ashcroft's office aware of some of the conditions imposed, but affirmatively supported them. *See also id.* at 113 (DOJ officials told Sawyer to "take [BOP] policies to their legal limit").[22] Furthermore, the OIG Report also makes clear that conditions in the ADMAX SHU began to receive media attention soon after detentions began, *see id.* at 2, 5;[23] thus, it seems implausible that the public's concerns did not reach the DOJ Defendants' desks.

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[22] The dissent attempts to minimize the force of these comments, claiming that communications about a condition of confinement that was lifted before the merger decision cannot support an inference as to what the DOJ Defendants knew about the conditions in the ADMAX SHU. Dissenting Op., *post* at 288-89. Simply put, we disagree. The fact remains that a condition of confinement, less severe and abusive than the conditions at issue here, garnered the attention of senior officials; it stands to reason that conditions that kept detainees in their cells for twenty-three hours a day, denied them sleep by bright lights, and involved excessive strip searches and physical abuse, would have come to the DOJ Defendants' attention.

[23] *See, e.g.*, Neil A. Lewis, *A Nation Challenged: The Detainees; Detentions After Attacks Pass 1,000, U.S. Says*, N.Y. TIMES, Oct. 30, 2001, *available at* http://www.nytimes.com/2001/10/30/us/a-nation-challenged-the-detainees-detentions-after-attacks-pass-1000-us-says.html (citing "common news reports of abuse involv[ing] mistreatment of prisoners of Middle Eastern background at jails").

Of course, we cannot say for certain that daily reports given to Ashcroft and Mueller detailed the conditions at the ADMAX SHU or that the daily meetings of the SIOC Working Group (containing representatives from each of the DOJ Defendants' offices) discussed those conditions. But on review of a motion to dismiss, Plaintiffs need not *prove* their allegations; they must *plausibly plead* them. At a minimum, a steady stream of information regarding the challenged conditions flowed between the BOP and senior DOJ officials. Given the MDC Plaintiffs' allegations, the media coverage of conditions at the MDC, and the DOJ Defendants' announced central roles in PENTTBOM, it seems to us plausible that information concerning conditions at the MDC, which held eighty-four of the 9/11 detainees, reached the DOJ Defendants.[24]

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[24] Furthermore, the OIG reports were issued pursuant to the Office of the Inspector General's responsibilities under the USA PATRIOT Act, which was enacted on October 26, 2001. *See* OIG Report at 3 n.6. The PATRIOT Act, Section 1001, reads: "The Inspector General of the Department of Justice shall designate one official who shall—(1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272 (2001). "On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter." OIG Report at 144. It seems to us most plausible that if the OIG—who is "under the authority, direction, and control of the Attorney General with respect to audits or investigations," 5 U.S.C. App. 3 § 8E(a)(1)—was aware of the challenged conditions at the MDC, the DOJ Defendants were as well.

2. *Lack of Individualized Suspicion*

The MDC Plaintiffs also plausibly plead that the DOJ Defendants were aware that the FBI had not developed any connection between some of the detainees and terrorist activities. The Complaint and OIG Report both make clear that the New York FBI arrested all "out-of-status" aliens encountered—even coincidentally—in the course of investigating a PENTTBOM lead. OIG Report at 41-42, 69-70. These arrestees were "deemed 'of interest' for purposes of the 'hold until cleared' policy, regardless of the strength of the evidence or the origin of the lead." *Id.* at 41. Those deemed of "high interest" were sent to the MDC's ADMAX SHU, *id.* at 111, but "there was little consistency or precision to the process that resulted in detainees being labeled 'high interest,'" *id.* at 158.[25]

Even if the DOJ Defendants were not initially aware of this practice, the Complaint and OIG reports support the reasonable inference that Ashcroft and Mueller learned of it within weeks of 9/11. The Complaint clearly alleges that the DOJ Defendants agreed that individuals for whom the FBI could only articulate an immigration law violation as a reason for detention—and for whom the FBI had not developed any reliable tie to terrorism—would continue to be treated as if the FBI had reason to believe the detainees had ties to terrorist activity.

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[25] Even some detainees who were not labeled "high interest" were nonetheless sent to the MDC's ADMAX SHU. For example, "Abbasi, Bajracharya, Mehmood, and Khalifa[ ] were placed in the ADMAX SHU even though they had not been classified 'high interest' and despite the absence of any information indicating they were dangerous or involved in terrorism, or any other legitimate reason for such treatment." Compl. ¶ 4.

Compl. ¶ 67. Plaintiffs point to the detailed daily reports that the DOJ Defendants received regarding arrests and detentions and allege that the DOJ Defendants "were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' to the PENTTBOM investigation." *Id.* ¶ 47. Indeed, they claim that Ashcroft, in particular, "insisted on regular, detailed reporting on arrests"; they allege that he received a daily "Attorney General's Report" on persons arrested. *Id.* ¶ 63. They further allege that it was Ziglar who was ultimately responsible for providing much of this information—which he gleaned from his twice daily briefings with his staff regarding the 9/11 detentions—to Ashcroft, indicating that he too was aware of the lack of individualized suspicion. *Id.* ¶ 64.

Once again, the OIG reports also support the MDC Plaintiffs' allegation that the DOJ Defendants became aware of the lack of individualized suspicion for some detainees held in the challenged conditions of confinement. The OIG Report states that "[a] variety of INS, FBI, and [DOJ] officials who worked on the[ ] September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism." OIG Report at 45. Other DOJ officials also stated that it "soon became clear" that only some of the detainees were of "genuine investigative interest"—as opposed to aliens identified by the FBI as "of interest" for whom the FBI had no suspicion of a connection to the attacks or terrorism in general. *Id.* at 47.

The OIG Report supports the reasonable inference that this information, known by other DOJ officials, came to the attention of the DOJ Defendants. In particular,

the OIG Report specifies that Ashcroft and Mueller were involved in a "'continuous meeting' for the first few months" after 9/11, at which "the issue of holding aliens until they were cleared was discussed." *Id.* at 39-40. Furthermore, the OIG Report makes clear that the SIOC Working Group, containing representatives from the offices of each of the DOJ Defendants, was aware of the lack of evidence tying detainees to terrorism. *Id.* at 53-57. As we have already noted, the OIG Report details how at some point in October 2001, the SIOC Working Group learned about the New York List and that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." *Id.* at 53. Clearly this created a major problem for the DOJ. The existence of the New York List suddenly presented the possibility of more than doubling the number of detainees subject to the hold-until-cleared policy.[26] It seems quite *plausible* that DOJ officials would confer with the Attorney General and the Director of the FBI (it was, after all, his agents who were arresting out-of-status Arab and Muslim aliens and holding them as if they were "of interest" without any suspicion of terrorist connections) about the problem of the New York List and the hundreds of detainees picked up in contravention of Ashcroft's stated policy. Indeed, it seems to us *implausible* they did not. Finally, the OIG Report once again makes clear that media reports regarding allegations of mistreatment of detainees alleged that detainees remained in detention even though they had no involvement in terrorism. *Id.* at 2, 5.

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[26] In October and November of 2001, the New York List contained approximately 300 detainees while the INS List for the rest of the nation contained only 200 detainees. OIG Report at 54.

3. *The Decision to Merge the Lists*

Plaintiffs plausibly plead that, despite the DOJ Defendants' knowledge of the conditions at the ADMAX SHU and the lack of any form of verified suspicion for a large number of those detainees on the New York List, Ashcroft approved, or at least endorsed, a decision to merge the New York List. The MDC Plaintiffs contend that he did so notwithstanding vocal opposition from various internal sources. The Complaint clearly alleges that "[a]gainst significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members [on the New York List] be detained until cleared and otherwise treated as 'of interest.'" Compl. ¶ 47. By taking this action, Ashcroft ensured that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement.

Our dissenting colleague levels a concern as to the import of the merger of the lists and counters that nothing in the OIG reports confirms Ashcroft's personal knowledge of the correlation between the merger of the lists and the lack of individualized suspicion as to the MDC Plaintiffs. The dissent contends that, because Plaintiffs' allegations are not based on personal knowledge, there is no factual basis in the record for them. Dissenting Op., *post* at 284. True enough that Ashcroft did not acknowledge that he was aware of the merger of the lists and its implication for the MDC Plaintiffs, nor did he take responsibility for it. But then again a review of the OIG Report gives no indication that anybody asked him.

The absence of an inquiry to the former Attorney General is not a criticism of the Office of the Inspector General's methods, but a simple recognition of a fact that points out a key difference between our view of the OIG reports and that of the dissent. For us, the OIG reports provide context for the allegations of the Complaint. *See supra* note 6. However, it would be a mistake to think of the OIG reports as a repository of all relevant facts of that troubled time; but that is exactly what the dissent seems inclined to do. The dissent measures plausibility by the absence or presence of fact-findings in the OIG reports. Thus, for the dissent, the fact that the Attorney General may not have been questioned is confirmation that he knew nothing. The reports make no such assertion.

It may be that following discovery it will be clear that Ashcroft was not responsible for the merger decision (nor was Mueller or Ziglar), but that is not the question at the pleading stage. The question is whether the MDC Plaintiffs plausibly plead that Ashcroft was responsible. Given the importance of the merger and its implications for how his lawful original order was being carried out, we think the MDC Plaintiffs plausibly allege that he was.

Indeed, the OIG Report supports the MDC Plaintiffs' allegation that Ashcroft was responsible for the merger decision. An incident at one of the New York List meetings provides additional context that supports that allegation. At the November 2, 2001 meeting, the group discussed the necessity of CIA checks, often a prerequisite to a 9/11 detainee's release from detention. OIG Report at 55. In response, Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues, stated that he had to "check" before communicating a decision on whether "any detainees could be

released without the CIA check." *Id.* at 56. This response could reasonably indicate (a) a lack of authority to respond to the question, or (b) that Levey wanted to consider other views before making the decision. Because either is plausible, it is irrelevant that only inference (a) supports the conclusion that Levey could not answer the question on his own and had to take it to more senior officials.[27]

Furthermore, in late November 2001, when the INS Chief of Staff approached Levey about the CIA check policy, Levey said that he "did not feel comfortable making the decision about [the] request to change the CIA check policy without additional input." *Id.* at 62. It seems to us that if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance.[28]

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[27] The OIG Report states that Levey specifically consulted David Laufman, the Deputy Attorney General's Chief of Staff. OIG Report at 62. The dissent takes this as definitive proof that Ashcroft was not consulted on this, or the merger, decision. Dissenting Op., *post* at 284-85. The dissent mischaracterizes our reference to the CIA checks decision. We do not contend that Levey consulted Ashcroft about *that* decision, nor do we need to. In our view, the fact that Levey spoke to Laufman about *that* decision is not the end of the matter; indeed, the only relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list-merger decision on his own.

[28] Indeed, Ziglar told the OIG that he contacted Ashcroft's office on November 7, 2001, to discuss concerns about the process of clearing names from the INS Custody List, especially the impact that merging the lists would have on that process and said that

The dissent argues that the OIG Report forecloses the plausibility of the allegation that Levey brought the list-merger decision to Ashcroft because "Levey made the lists-merger decision '[a]t the conclusion of the [November 2] meeting' at which the subject was first raised to him." Dissenting Op., *post* at 285 (quoting OIG Report at 56). But the OIG Report does *not* indicate that the merger issue was first raised to Levey at the November 2 meeting. Rather, the OIG Report makes clear that the issue of the New York List was discovered in October 2001,[29] and that the decision to merge the lists was communicated at the November 2 meeting. Thus, surely it is plausible that Levey consulted with more senior officials, including Ashcroft, *prior to* that meeting.[30] Of

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"based on these and other contacts with senior Department officials, he believed the Department was fully aware" of the INS's concerns. OIG Report at 66-67. This also suggests that Levey had communicated those concerns to Ashcroft, who nonetheless made the decision to merge the lists.

[29] While the dissent's observation that Levey did not attend the October 22, 2001 meeting during which the "problems presented by the New York List" were discussed is accurate, it is also irrelevant. *See* Dissenting Op., *post* at 285-86 (quoting OIG Report at 55). We do not contend that Levey learned about the New York List at the October 22 meeting, but simply that he learned about it *before* the November 2 meeting, giving him time to consult with more senior officials, including Ashcroft, before communicating a decision at that November meeting. Indeed, one would think that Levey would not attend the November 2 meeting without knowing its agenda.

[30] The dissent challenges the sufficiency of Plaintiffs' allegations and our reading of them as "wholly speculative." Dissenting Op., *post* at 285. Of course, Plaintiffs have no way of knowing what Levey and Ashcroft discussed; nor do we. *Iqbal* does not require as much, but rather "sufficient factual matter, accepted as true" to allow the court to draw the reasonable inference that Ashcroft was

course, discovery may show that Levey was solely responsible for the decision. But, again, the question is whether Plaintiffs' allegations support the inference that the decision was Ashcroft's; they do.

The MDC Plaintiffs' allegations against Mueller and Ziglar are also sufficient. The Complaint alleges, *inter alia*, that Ashcroft made the decision to merge the lists in spite of the lack of individualized suspicion linking the MDC Plaintiffs to terrorism and that "Mueller and Ziglar were fully informed of this decision, and complied with it." Compl. ¶ 47; *see also id.* ¶¶ 55-57, 67. Mueller and Ziglar are not exculpated from this claim merely because Plaintiffs allege that they complied with, as opposed to ordered, the list merger. Plaintiffs plausibly plead that both were aware that the separate list contained detainees for whom the FBI had asserted no interest and that subjecting them to the challenged conditions would be facially unreasonable. Even if an official is not the source of a challenged policy, that official can be held personally liable for constitutional violations stemming from the execution of his superior's orders if those orders are facially invalid or clearly illegal. *See, e.g., Varrone v. Bilotti*, 123 F.3d 75, 81 (2d Cir. 1997) (granting defendants qualified immunity where there was "no claim that the order was facially invalid or obviously illegal"). In this instance, Plaintiffs plausibly allege that Ashcroft's decision was facially invalid; it would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful.

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ultimately responsible for the decision. 556 U.S. at 678, 129 S. Ct. 1937. We believe that Plaintiffs have met this burden.

4. *Punitive Intent*

The MDC Plaintiffs must show not only that the DOJ Defendants knew of and approved continued use of the ADMAX SHU, but also that they did so with punitive intent—that they endorsed the use of those conditions with an intent to punish the MDC Plaintiffs. Federal courts have long recognized that punitive intent is not often admitted. The Supreme Court has noted that it can be inferred if the conditions of confinement are "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861. If the conditions under which one is held have no reasonable connection to a legitimate goal of the state, then one logical assumption is that they are imposed for no other purpose than to punish. *See id.*

The DOJ Defendants argue that even if they knew of the plight of the MDC Plaintiffs, the decision to continue their confinement at the MDC under exceptionally harsh conditions was motivated by national security concerns—a legitimate worry during the days following the 9/11 attacks—and not some animus directed at the MDC Plaintiffs. They seem to imply that once "national security" concerns become a reason for holding someone, there is no need to show a connection between those concerns and the captive other than that the captive shares common traits of the terrorist: illegal immigrant status and a perceived Arab or Muslim affiliation. Indeed, our dissenting colleague asserts that because the MDC Plaintiffs were, or appeared to be, members of the group —Arab or Muslim males—that was targeted for recruitment by al Qaeda that they could be held in the ADMAX SHU without any reasonable suspicion of terrorist activity. Dissenting Op., *post* at 291-92, 295-97. Under this view, the MDC Plaintiffs were not held with punitive in-

tent because there was no way to know that they were not involved in terrorist activities. Simply being in the United States illegally and being, or appearing to be, Arab or Muslim was enough to justify detention in the most restrictive conditions of confinement available. Indeed, Levey admitted that the decision to merge the lists, ensuring that some of the 9/11 detainees would be subject to the challenged harsh conditions of confinement, was made because he "wanted to err on the side of caution so that a terrorist would not be released by mistake." OIG Report at 56.

This argument rests on the assumption that if an individual was an out-of-status Arab or Muslim, and someone called the FBI for even the most absurd reason, that individual was considered a possible threat to national security. It presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact. There was no legitimate governmental purpose in holding someone in the most restrictive conditions of confinement available simply because he happened to be—or, worse yet, appeared to be—Arab or Muslim.

To be clear, it is "no surprise"—nor is it constitutionally problematic—that the enforcement of our immigration laws in the wake of 9/11 had a "disparate, incidental impact on Arab Muslims." *Iqbal*, 556 U.S. at 682, 129 S. Ct. 1937. And we do not contend that Supreme Court, or our own, precedent requires individualized suspicion to subject detainees to *generally* restrictive conditions of confinement; restriction is an incident of detention. Rather, we simply acknowledge that "if a restriction or condition is not reasonably related to a legitimate goal—if

it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861. We believe, then, that the challenged conditions—keeping detainees in their cells for twenty-three hours a day, constructively denying them recreation and exposing them to the elements, strip searching them whenever they were removed from or returned to their cells, denying them sleep by bright lights—were not reasonably related to a legitimate goal, but rather were punitive and unconstitutional.

While national security concerns could justify detaining those individuals with suspected ties to terrorism in these challenged conditions for the litany of reasons articulated by the dissent, *see* Dissenting Op., *post* at 292-93, those concerns do not justify detaining individuals solely on the basis of an immigration violation and their perceived race or religion in those same conditions. Individualized suspicion is required here because, absent some indication that the detainees had a tie to terrorism, the restrictions or conditions of the ADMAX SHU were "arbitrary or purposeless." *Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861.[31]

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[31] The dissent cites several cases that it claims demonstrate that individualized suspicion is not required for imposing restrictive conditions of confinement. Dissenting Op., *post* at 290-91. We do not disagree: individualized suspicion is not required to impose conditions that are reasonably related to a legitimate governmental objective. *Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861. Thus, in each of the cases cited by the dissent, rather than announce that individualized suspicion was not required, the Supreme Court determined that the restrictions at issue in each of those cases were related to the legitimate goal of prison security and, therefore,

Indeed, in *Wolfish*, the Supreme Court acknowledged that "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his [detention] and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Id.* at 539 n.20, 99 S. Ct. 1861. That is the situation before us. Clearly detention conditions less restrictive than the ADMAX SHU were feasible for the MDC Plaintiffs, given that the detainees held in the Passaic facility "were not held in isolation or otherwise placed in restrictive confinement." Compl. ¶ 66. Placing the MDC Plaintiffs in chains and shackles and throwing them in the ADMAX SHU ensured that they posed no threat in the aftermath of 9/11; but we can reach no conclusion other than that the DOJ Defendants' decision to do so was made with punitive intent.

In view of the foregoing, we hold that the MDC Plaintiffs fail to plausibly plead a substantive due process claim against the DOJ Defendants coextensive with the entire post-9/11 investigation and reaching back to the time of Plaintiffs' initial detention. Nonetheless, Plaintiffs' well-pleaded allegations, in conjunction with the OIG Report's documentation of events such as the New York List controversy, render plausible the claim that by the beginning of November 2001, Ashcroft knew of, and approved, the

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were not punitive. Thus, the cases cited by the dissent do not change our conclusion here, where the challenged conditions—the most restrictive available and imposed on detainees *qua* detainees—are not reasonably related to either the goal of prison security, or national security.

MDC Plaintiffs' confinement under severe conditions, and that Mueller and Ziglar complied with Ashcroft's order notwithstanding their knowledge that the government had no evidence linking the MDC Plaintiffs to terrorist activity. Discovery may ultimately prove otherwise, but for present purposes, the MDC Plaintiffs' substantive due process claim—with the exception of the temporal limitation noted above—may proceed against the DOJ Defendants.

5. *Qualified Immunity*

A defendant is entitled to qualified immunity if he can establish (1) that the complaint fails to plausibly plead that the defendant personally violated the plaintiff's constitutional rights, or (2) that the right was not clearly established at the time in question. *See Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009); *Varrone*, 123 F.3d at 78 (noting that the qualified immunity inquiry turns, generally, on the objective legal reasonableness of a defendant's actions).

For the reasons stated above, the MDC Plaintiffs plausibly plead that the DOJ Defendants violated their substantive due process rights. With regard to the second prong of this inquiry, the law regarding the punishment of pretrial detainees was clearly established in the fall of 2001. As discussed, *Wolfish* made clear that a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. *See* 441 U.S. at 535-39 & n.20, 99 S. Ct. 1861. And in *Hasty*, this Court denied qualified immunity with respect to a materially identical conditions claim against Hasty. 490 F.3d at 168-69. We explained that "[t]he right of pretrial detainees to be free from punitive re-

straints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a pretrial detainee by subjecting him to the practices and conditions alleged by the Plaintiff." *Id.* at 169.

Hasty further rejected the argument that the post-9/11 context warranted qualified immunity even if it was otherwise unavailable. *Id.* at 159-60, 169. Recognizing the "gravity of the situation" that 9/11 presented, we explained that qualified immunity remained inappropriate because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances. *Id.* at 159. Nothing has undermined the logic or precedential authority of our qualified immunity holding in *Hasty*. We therefore conclude that the DOJ Defendants are not entitled to qualified immunity on the MDC Plaintiffs' conditions of confinement claim.

C. The MDC Defendants

In his opinion below, Judge Gleeson divided the MDC Plaintiffs' conditions of confinement claim against the MDC Defendants into two categories: "official conditions" allegations and "unofficial abuse" allegations. The "official conditions" allegations concern express confinement policies that the MDC Defendants approved and implemented; the "unofficial abuse" allegations concern the physical and verbal abuse that the MDC Defendants employed or permitted their subordinates to employ. We find this taxonomy helpful in analyzing the conditions claim against Hasty, Sherman, and Zenk.[32]

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[32] Plaintiffs' allegations against Zenk do not extend to the "unofficial abuse" nor to any harm arising from the "official conditions"

1. *Official Conditions*

The MDC Plaintiffs generally allege that the "official conditions" to which the MDC Defendants subjected them constituted punishment. We do not address whether Plaintiffs have sufficiently alleged an express intent to punish, but rather analyze whether they have plausibly pleaded that (1) the MDC Defendants caused them to suffer the challenged conditions, and that (2) the challenged conditions were "not reasonably related to a legitimate goal," which allows us to infer punitive intent, *Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861.

The MDC Plaintiffs plausibly plead that Hasty and Sherman are personally responsible for and caused the MDC Plaintiffs to suffer the challenged conditions. The Complaint contains allegations that Hasty ordered the creation of the ADMAX SHU and directed two of his subordinates to design "extremely restrictive conditions of confinement." Compl. ¶¶ 24, 75; *see also id.* ¶ 76 (describing the extreme conditions in the ADMAX SHU). According to the Complaint, those conditions were then approved and implemented by Hasty and Sherman. *Id.* ¶ 75.

The OIG reports support these allegations. While the decision to impose highly restrictive conditions was made at BOP headquarters, OIG Report at 19, MDC officials created the particular conditions imposed, *id.* at 124-25. The reports specify that MDC officials modified one wing of the preexisting SHU to accommodate the detainees and that the ADMAX SHU was "designed to confine the detainees in the most restrictive and secure conditions

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that occurred prior to April 22, 2002, the date he became MDC Warden.

permitted by BOP policy." Supplemental OIG Report at 2-3. As Warden and Associate Warden of the MDC, Hasty and Sherman had the responsibility to carry out these tasks. But that alone would not sustain liability for either.

However, the MDC Plaintiffs also plausibly plead that Hasty and Sherman subjected them to the challenged conditions with punitive intent because the conditions were "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861. Specifically, the MDC Plaintiffs allege that Hasty and Sherman imposed these harsh conditions despite the fact that they "were aware that the FBI had not developed any information to tie the MDC Plaintiffs [and other detainees] they placed in the ADMAX SHU to terrorism." Compl. ¶ 69. As discussed above with respect to the DOJ Defendants, individualized suspicion was not required to subject detainees to the restrictive conditions of confinement inherent in any detention. But the challenged conditions were not simply restrictive; they were punitive: there is no legitimate governmental purpose in holding someone as if he were a terrorist simply because he happens to be, or appears to be, Arab or Muslim.

The MDC Defendants, and our dissenting colleague, note that BOP Headquarters ordered that the detainees "be placed in the highest level of restrictive detention" and, thus, argue that we cannot infer punitive intent from the MDC Defendants' compliance with that order. *See* Dissenting Op., *post* at 295 n.40, 294 (quoting OIG Report at 112). They further claim that because the FBI had designated the individuals held in the ADMAX SHU as "of interest," the MDC Defendants are absolved from liability. *See, e.g.*, Hasty Br. 17, 25-26.

But even if Hasty and Sherman *initially* believed that they would be housing only those detainees who were suspected of ties to terrorism, the Complaint contains sufficient factual allegations that the MDC Defendants eventually knew that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU. Plaintiffs allege that Hasty and Sherman received regular written updates explaining why each detainee had been arrested and including "all evidence relevant to the danger he might pose" to the MDC, and that these updates often lacked any indication of a suspicion of a tie to terrorism. Compl. ¶ 69.[33] They further explain that "[t]he exact language of these updates was repeated weekly, indicating the continued lack of any information tying [Plaintiffs] to terrorism, or tending to show that any of them might pose a danger." *Id.* ¶ 73.

The MDC Plaintiffs relatedly allege that Hasty and Sherman knew that BOP regulations require individualized assessments for detainees placed in the SHU for more than seven days, yet ordered the MDC Plaintiffs' continued detention in the ADMAX SHU without performing these assessments, and Hasty "ordered [his] subordinates to ignore BOP regulations regarding detention conditions." *Id.* ¶ 68; *see also id.* ¶¶ 73-74.

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[33] For example, the MDC Defendants were informed that Plaintiff Abbasi was "'encountered' by INS pursuant to an FBI lead; that he used a fraudulent passport to enter the U.S. to seek asylum, and later destroyed that passport; that he requested and was denied various forms of immigration relief; that he obtained and used a fraudulent advance parole letter to enter the country, and that he was thus inadmissible. The update included no statement of FBI interest in Abbasi." Compl. ¶ 72.

The MDC Plaintiffs further allege that Hasty and Sherman approved a document that falsely stated that "executive staff at MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id.* ¶ 74. In addition, the MDC Plaintiffs allege that Hasty and Sherman continued to detain them in the ADMAX SHU even after affirmatively learning that the FBI lacked individualized evidence linking Plaintiffs to terrorism. *See id.* ¶¶ 69-71, 74. These allegations are buttressed by Plaintiffs' assertions that they remained confined in the ADMAX SHU even after receiving final clearance from the New York FBI field office and FBI Headquarters. For instance, the Complaint alleges that Benamar Benatta was cleared on November 14, 2001, that this information was available to the MDC, and that Benatta nonetheless remained in the ADMAX SHU until April 30, 2002. *See id.* ¶ 188.

The OIG Report directly supports these allegations; as stated by one BOP official, all 9/11 detainees at the MDC were placed in the ADMAX SHU and subjected to the official conditions because, at least initially, "the BOP did not really know whom the detainees were." OIG Report at 19; *see also* Compl. ¶ 4; OIG Report at 112, 126. Specific factual allegations that Hasty and Sherman failed to assess whether the restrictive conditions were appropriate for individual 9/11 detainees buttress the MDC Plaintiffs' claim that the challenged conditions were not reasonably related to a legitimate goal, and that Hasty and Sherman were personally responsible for the treatment.

We recognize that the MDC Defendants may have been in a difficult position when they received detainees

without accompanying information regarding those individuals. Record proof may eventually establish that the MDC Plaintiffs' claim is limited to the period of time that Hasty and Sherman knew that the MDC Plaintiffs were being held without suspicion of ties to terrorism. But we cannot conclude, at least at the motion to dismiss stage, that it was reasonable to take a default position of imposing the most restrictive form of detention available when one *lacks* individualized evidence that the detainee poses a danger to the institution or the nation. Accordingly, we conclude that the MDC Plaintiffs plausibly plead a substantive due process claim against Hasty and Sherman as to the official conditions.

The Complaint does not, however, permit an inference of personal liability as to Zenk, who did not become MDC Warden until April 22, 2002, when only two Plaintiffs remained in the ADMAX SHU. Fundamentally, the allegations that personally identify Zenk are too general and conclusory to support Plaintiffs' claim. We therefore dismiss the MDC Plaintiffs' substantive due process claim against Zenk.

2. *Unofficial Abuse*

The district court properly viewed the MDC Plaintiffs' "unofficial abuse" allegations under the deliberate indifference standard commonly applied in the Eighth Amendment prisoner-mistreatment context. *See Turkmen III*, 915 F. Supp. 2d at 341 & n.13.[34] Given the

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[34] The deliberate indifference standard would clearly apply if the MDC Plaintiffs had been prisoners entitled to the Eighth Amendment's protection against cruel and unusual punishment. *See Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013). Because a pretrial detainee's rights are at least as robust as those of a sentenced prisoner, we have applied the Eighth Amendment deliberate indif-

nature of the MDC Plaintiffs' "unofficial abuse" allegations, premising liability on Hasty and Sherman's deliberate indifference is consistent with *Iqbal's* holding that *Bivens* defendants are liable only if, through their own actions, they satisfy each element of the underlying constitutional tort. *See* 556 U.S. at 676, 129 S. Ct. 1937.

Prior to *Iqbal*, this Court recognized claims against a supervisory defendant so long as the defendant was personally involved with the alleged constitutional violation. In *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), this Court identified five ways in which a plaintiff may establish a defendant's personal involvement. One is through a defendant's "deliberate indifference." *Id.* As the district court explained, the fact that a particular type of conduct constitutes "personal involvement" under *Colon* does not inherently preclude the conduct from also supporting a theory of direct liability. *Turkmen III*, 915 F. Supp. 2d at 335-36. For instance, plausibly pleading that a defendant "participated directly in the alleged constitutional violation"—one form of personal involvement enumerated in *Colon*, 58 F.3d at 873—could establish direct, as opposed to vicarious, liability. The proper inquiry is not the name we bestow on a particular theory or standard, but rather whether that standard—be it deliberate indifference, punitive intent, or discriminatory intent—reflects the elements of the underlying constitutional tort. *See Iqbal*, 556 U.S. at 676, 129 S. Ct. 1937

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ference test to pretrial detainees bringing claims under the Due Process Clause of the Fifth Amendment. *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). We do not address whether civil immigration detainees should be governed by an even more protective standard than pretrial criminal detainees.

("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.").

Our conclusion is consistent with *Iqbal*, this Court's prior rulings, *see Walker*, 717 F.3d at 125, and the weight of Circuit precedent. For instance, in *Starr v. Baca*, 652 F.3d 1202, 1206-07 (9th Cir. 2011), the Ninth Circuit determined that *Iqbal* does not preclude *Bivens* claims premised on deliberate indifference when the underlying constitutional violation requires no more than deliberate indifference. *See also Dodds v. Richardson*, 614 F.3d 1185, 1204-05 (10th Cir. 2010); *Sandra T.E. v. Grindle*, 599 F.3d 583, 590-91 (7th Cir. 2010); *Sanchez v. Pereira- Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

The MDC Plaintiffs' "unofficial abuse" claim therefore survives so long as Plaintiffs plausibly plead that the conditions were sufficiently serious, and Hasty and Sherman "kn[e]w of, and disregard[ed], an excessive risk to inmate health or safety." *Walker*, 717 F.3d at 125 (internal quotation marks omitted); *accord Cuoco*, 222 F.3d at 107. The MDC Plaintiffs clearly meet this standard with respect to Hasty. Simply stated, their factual allegations permit the inference that he knew that MDC staff subjected the MDC Plaintiffs to the "unofficial abuses" and permitted—if not facilitated—the continuation of these abuses. *See* Compl. ¶¶ 24, 77-78, 107, 109-10.

For example, the Complaint contains allegations that Hasty avoided evidence of detainee abuse by "neglecting to make rounds on the ADMAX [SHU] unit," as was required of him by BOP policy. *Id.* ¶ 24. The MDC Plaintiffs also allege that Hasty was nonetheless made aware of the abuse "through inmate complaints, staff complaints, hunger strikes, and suicide attempts." *Id.*; *see also id.* ¶¶ 77-78 (detailing how Hasty made it difficult

for detainees to file complaints and ignored the evidence when they did, and how staff officials who complained were called "snitches" and were threatened). Indeed, complaints about abuse of 9/11 detainees were pervasive enough to cause the BOP to videotape all detainee movements and resulted in the investigations later detailed in the OIG reports. *Id.* ¶ 107. The MDC Plaintiffs also complain that Hasty encouraged his subordinates' harsh treatment of the detainees by himself referring to the detainees as terrorists. *Id.* ¶¶ 77, 109.

The allegations against Sherman, because they are more general and conclusory in nature, are more tenuous. For instance, Plaintiffs allege principally that Sherman "allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. Sherman made rounds on the ADMAX SHU and was aware of conditions there." *Id.* ¶ 26. These allegations lack a specific factual basis to support a claim that Sherman was aware of the particular abuses at issue. Therefore, we hold that the MDC Plaintiffs fail to plausibly plead an unofficial conditions claim as to Sherman.[35]

3. *Qualified Immunity*

The MDC Defendants claim that qualified immunity is appropriate because they were merely following the orders of BOP superiors, "with the input and guidance of the FBI and INS." *See, e.g.*, Hasty Br. 33. Specifically, Hasty claims that the "BOP, INS, and FBI officials ordered [him] to place 'high interest' 9/11 detainees in the ADMAX SHU, and directed that they be subject to the

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[35] The MDC Plaintiffs nonetheless maintain a substantive due process claim against Sherman as to the official conditions, as discussed *supra*.

'tightest' security possible." *Id.* He further argues that "[t]he sole basis for the detainees' confinement in the ADMAX SHU—the FBI's investigative interest—was outside the scope of MDC officials' discretion." *Id.* at 35. By extension, he claims that it was reasonable to detain the MDC Plaintiffs and other "high interest" 9/11 detainees in the ADMAX SHU.

These arguments fail. First, as with the DOJ Defendants, our qualified immunity analysis in *Hasty* applies with equal force to the MDC Plaintiffs' conditions claim against Hasty and Sherman in this case. *See Hasty*, 490 F.3d at 168-69. In 2001, it was clearly established that punitive conditions of confinement, like those involved here, could not be imposed on pretrial detainees such as the MDC Plaintiffs. As discussed above with respect to the DOJ Defendants, *Wolfish* made clear that a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. *See* 441 U.S. at 535-39 & n.20, 99 S. Ct. 1861; *Hasty*, 490 F.3d at 169. Furthermore, given the nearly identical claims and circumstances in *Hasty* and this case, we see no reason to depart from our prior determination that Hasty was not entitled to qualified immunity.

Nor is Hasty entitled to qualified immunity with regard to the unofficial conditions claim. As discussed, the MDC Plaintiffs have plausibly alleged that Hasty personally violated their constitutional rights by knowing of, and disregarding, an excessive risk to their health or safety. The right of the MDC Plaintiffs to be free from such unofficial abuse was clearly established at the time of the events in question. *See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200, 109 S. Ct.

998, 103 L. Ed. 2d 249 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause."); *see also Walker*, 717 F.3d at 125, 130; *Cuoco*, 222 F.3d at 106.

Plaintiffs' allegations, the OIG Report, and the MDC Defendants' arguments confirm that Hasty and Sherman housed 9/11 detainees for extended periods of time in highly restrictive conditions without ever obtaining individualized information that would warrant this treatment. Because Plaintiffs' allegations support an inference of punitive intent, and it would be inappropriate to wrestle with competing factual accounts at this stage of the litigation, we hold that a reasonable officer in the MDC Defendants' position would have concluded that this treatment was not reasonably related to a legitimate goal.

IV. Claim 2: Equal Protection—Conditions of Confinement

Plaintiffs next assert a claim that Defendants subjected them to the harsh conditions of confinement detailed above based on their race, ethnicity, religion, and/or national origin, in violation of the equal protection guarantee of the Fifth Amendment.[36]

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[36] All Plaintiffs assert an equal protection claim against the DOJ Defendants. Abbasi, Khalifa, Mehmood, and Bajracharya do not assert this claim against Zenk, and Sachdeva and Turkmen do not make this claim against any of the MDC Defendants.

A. Applicable Legal Standard

To state an equal protection violation under the Fifth Amendment, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676, 129 S. Ct. 1937. "[P]urposeful discrimination requires more than intent as volition or intent as awareness of consequences." *Id.* (internal quotation marks omitted). "It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group." *Id.* at 676-77, 129 S. Ct. 1937 (alteration in original) (internal quotation marks omitted).

A plaintiff can show intentional discrimination by: (1) "point[ing] to a law or policy that expressly classifies persons on the basis of" a suspect classification; (2) "identify[ing] a facially neutral law or policy that has been applied in an intentionally discriminatory manner[;]" or (3) "alleg[ing] that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus." *Brown v. City of Oneonta, N.Y.*, 221 F.3d 329, 337 (2d Cir. 2000) (internal quotation marks omitted). The district court characterized Plaintiffs' equal protection claim as falling within the first category —that is, a claim that Defendants subjected Plaintiffs to the challenged conditions of confinement pursuant to a policy that expressly classified Plaintiffs on the basis of their race, ethnicity, religion, and/or national origin. Given our reading of Plaintiffs' allegations and arguments on appeal, we will not analyze this claim, particularly as it relates to the MDC Defendants, under the first equal protection theory alone.

B. The DOJ Defendants

The district court concluded that Plaintiffs failed to state an equal protection claim against the DOJ Defendants, but "f[ou]nd the issue to be a close one." *Turkmen III*, 915 F. Supp. 2d at 345. In view of our analysis of Plaintiffs' substantive due process claim against the DOJ Defendants, and particularly these Defendants' roles with respect to the merger of the New York List, we hold that the MDC Plaintiffs have adequately alleged an equal protection claim against Ashcroft, Mueller, and Ziglar.

Plaintiffs' well-pleaded allegations and the OIG Report give rise to the following reasonable inferences, which render plausible the MDC Plaintiffs' equal protection claim against the DOJ Defendants: (1) the New York FBI field office discriminatorily targeted individuals in the 9/11 investigation not based on individualized suspicion, but rather based on race, ethnicity, religion, and/or national origin, and those individuals were then placed on the New York List; (2) the DOJ Defendants knew about the discriminatory manner in which the New York FBI field office placed individuals on the New York List; and (3) the DOJ Defendants condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subjected to the challenged conditions of confinement.

Plaintiffs allege that the New York FBI field office targeted individuals in the PENTTBOM investigation and placed them on the New York List based on race, ethnicity, religion, and/or national origin. "[T]he head of the New York FBI field office stated that an individual's Arab appearance and status as a Muslim were factors to consider in the investigation." Compl. ¶ 42. Even more

telling, a supervisor in the same local FBI office, "who oversaw the clearance process[,] stated that a tip about Russian tourists filming the Midtown tunnel was 'obviously' of no interest, but that the same tip about Egyptians was of interest." *Id.* Individuals who were arrested by the New York FBI and INS in connection with a PENTTBOM lead were automatically treated as "of interest," OIG Report at 40-41, and were placed on the New York List, *see id.* at 53.

This discriminatory approach, focusing on "an individual's Arab appearance," Compl. ¶ 42, is consistent with what is alleged to have occurred in Bajracharya's case. Bajracharya, who as noted, is a Buddhist and native of Nepal, came to the FBI's attention when an employee from the Queens County District Attorney's Office "observed an '[A]rab male' videotaping outside a Queens[ ] office building that contained the Queens County District Attorney'[s] Office and a New York FBI office." *Id.* ¶ 230. Investigators from the District Attorney's Office questioned Bajracharya about "why he was taking pictures," and Bajracharya "tried to explain that he was a tourist." *Id.* He was arrested after acknowledging he overstayed his visa and was detained in the ADMAX SHU. Given the Complaint's allegations regarding the New York FBI's tactics, it is reasonable to infer that officials in the New York FBI targeted certain individuals, including Plaintiffs, for investigation, arrest, and placement on the New York List simply because they were, or appeared to be, Arab or Muslim, *and not* because of any suspicion regarding a link to terrorism.

As we conclude above with respect to the substantive due process claim, the DOJ Defendants were informed of the problems presented by the New York List. As noted,

the OIG Report reveals that by October 2001 the SIOC Working Group learned about the New York List and that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." OIG Report at 53. Plaintiffs allege that a high-ranking DOJ official noted that individuals were detained "without any attempt" to determine if they were of "actual interest," and that the official "was concerned early in the investigation that detainees were being held simply on the basis of their ethnicity." Compl. ¶ 45. The DOJ Defendants were unlikely to have remained unaware of these concerns, as they "received detailed daily reports of the arrests and detentions," *id.* ¶ 47, *see also id.* ¶¶ 63-64, and Mueller "was in daily contact with the FBI field offices regarding the status of individual clearances," *id.* ¶ 57. In light of these allegations, we can reasonably infer that these Defendants were aware that the New York FBI field office was placing individuals on the New York List not because of any suspected ties to terrorism but rather because they were, or were perceived to be, Arab or Muslim.

While the DOJ Defendants' mere knowledge of this discriminatory action by the New York FBI field office would be insufficient to allow for the reasonable inference that these Defendants possessed the discriminatory purpose required to state an equal protection claim, Plaintiffs' allegations are not limited to the DOJ Defendants' knowledge alone. Rather, as we discuss in detail in the substantive due process analysis above, Plaintiffs plausibly plead that Ashcroft made the decision to merge the New York List with the national INS List, ensuring that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement. Plaintiffs further allege that Mueller

and Ziglar were aware that the New York List contained detainees against whom the FBI had asserted no interest and that subjecting them to the challenged conditions would be facially unreasonable. In ordering and complying with the merger of the New York List, the DOJ Defendants actively condoned the New York FBI field office's discriminatory formulation of that list.

The DOJ Defendants' condonation of the New York FBI field office's purposeful discrimination allows us to reasonably infer at the motion to dismiss stage that the DOJ Defendants themselves acted with discriminatory purpose. The Supreme Court in *Iqbal* stated that "discrete wrongs—for instance, beatings—by lower level Government actors[ ] . . . if true, and if condoned by [Ashcroft and Mueller], could be the basis for some inference of wrongful intent on [Ashcroft and Mueller's] part." 556 U.S. at 683, 129 S. Ct. 1937. In a similar vein, we have held, in a case involving an equal protection claim under 42 U.S.C. § 1983, that a reasonable factfinder could conclude that the Commissioner of the Fire Department of the City of New York intended to discriminate when he decided to continue to use the results of employment examinations that he knew had a disparate impact based on race. *See United States v. City of New York*, 717 F.3d 72, 94 (2d Cir. 2013). Here, it is reasonable to infer that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement.

Contrary to the dissent's contentions, *see* Dissenting Op., *post* at 295-97, this case is distinguishable from *Iqbal*, where the Supreme Court concluded that the plaintiff failed to state an equal protection claim. In *Iqbal*, there were "more likely explanations" for why the plaintiff was detained in harsh conditions other than his race, religion, or national origin. 556 U.S. at 681, 129 S. Ct. 1937. Those more likely explanations for the plaintiff's treatment, according to the Supreme Court, were that Ashcroft and Mueller supported "a legitimate policy . . . to arrest and detain individuals *because of their suspected link to the attacks*," which "produce[d] a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682, 129 S. Ct. 1937 (emphasis added). The Supreme Court noted that "[*o*]*n the facts respondent alleges* the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States *and who had potential connections to those who committed terrorist acts*." *Id.* (emphasis added); *see also id.* at 683, 129 S. Ct. 1937 (noting that all the allegations in *Iqbal* "suggest[ed] is that the Nation's top law enforcement officers . . . sought to keep *suspected terrorists* in the most secure conditions available until the suspects could be cleared of terrorist activity" (emphasis added)).

In this case, unlike in *Iqbal*, it is not "more likely" that the MDC Plaintiffs were detained in the challenged conditions *because of* their suspected ties to the 9/11 attacks. Indeed, as discussed at length earlier, Plaintiffs have plausibly alleged that they were detained without *any* suspicion of a link to terrorist activity and that the DOJ Defendants knew that the government lacked information tying Plaintiffs to terrorist activity, but decided to merge

the lists anyway.[37] Thus, unlike in *Iqbal*, there was no legitimate reason to detain the MDC Plaintiffs in the challenged conditions and, thus, no obvious, more likely explanation for the DOJ Defendants' actions with respect to the New York List merger.[38]

The dissent also argues that we cannot plausibly infer the DOJ Defendants' discriminatory intent from the merger decision because not all of the individuals on the New York List were subjected to the same level of restrictive confinement. *See* Dissenting Op., *post* at 297-98. But the fact that some individuals of the same race, ethnicity, religion, and/or national origin as the MDC Plaintiffs were restrained in the Passaic County Jail, as opposed to

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[37] Given the clear language used by the Supreme Court in *Iqbal* regarding the detainees' connections to terrorism, 556 U.S. at 682-83, 129 S. Ct. 1937, we understand the *Iqbal* Court to have rejected as conclusory the allegation in the *Iqbal* complaint identified by the dissent, which only pleads in the broadest terms that the *Iqbal* plaintiffs were confined without "any individual determination" that such restrictions were "appropriate or should continue." *See* Dissenting Op., *post* at 298 (quoting First Am. Compl. ¶ 97, App. to Pet. for Cert. 173a, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008), *available at* http://1.usa.gov/1CfHJQF). Here, in contrast, the well-pleaded allegations, as supported by the OIG reports, allege that the DOJ Defendants made, and complied with, the decision to merge the New York List with the national INS List, thereby ensuring that the MDC Plaintiffs, and others, remained in the challenged conditions of confinement despite the absence of any suspicion that they were tied to terrorism.

[38] Furthermore, the fact that Plaintiffs plausibly plead that the DOJ Defendants merged the New York List, and complied with the list merger, based on punitive intent (the substantive due process claim) arguably suggests the plausibility of the MDC Plaintiffs' allegations that the DOJ Defendants also possessed the discriminatory intent required for an equal protection claim. *See supra* Section III.B.

the ADMAX SHU, hardly dooms the MDC Plaintiffs' claim against the DOJ Defendants. There is no allegation that the DOJ Defendants were responsible for the assignment of certain actual or perceived Arab and Muslim males to Passaic as opposed to the more restrictive ADMAX SHU. *See* OIG Report at 17-18, 126-27, 158 (noting that assignment responsibility fell largely to the arresting FBI agent). Rather, Plaintiffs have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New York List with the INS List. The DOJ Defendants, apparently deferring to others' designation of detainees for particular facilities, thus ensured that some (and for all they knew, all) of the individuals on the New York List would be subjected to the challenged conditions of confinement solely on the basis of discriminatory criteria. The fact that some of these individuals were actually assigned to the less restrictive Passaic facility is thus a red herring.[39]

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[39] Moreover, to the extent this differential assignment of class members, again apparently by agents of the New York FBI and not the DOJ Defendants, might be relevant to Plaintiffs' equal protection claim, because it could suggest that the New York FBI was not actually discriminating, it is more appropriately considered at summary judgment. Indeed, the cases embraced by the dissent conclude that evidence of differential treatment of members of the same class may weaken an inference of discrimination *at the summary judgment stage*. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 309, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996) (summary judgment); *Fleming v. MaxMara USA, Inc.*, 371 Fed. Appx. 115, 116 (2d Cir. 2010) (summary order) (summary judgment); *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 151 (2d Cir. 2000) (summary judgment). In light of the well-pleaded allegations regarding discrimination by the New York FBI, Plaintiffs have hardly pleaded themselves out of court on this point.

Based on the foregoing, we conclude that the MDC Plaintiffs' allegations are sufficient to state an equal protection claim against Ashcroft, Mueller, and Ziglar for their condonation of the New York FBI's discriminatory formulation of the New York List, which resulted in the MDC Plaintiffs being subjected to the conditions of confinement challenged here.

C. The MDC Defendants

We agree with the district court that the MDC Plaintiffs have stated a plausible equal protection claim against Hasty and Sherman, although we base our decision on somewhat different reasoning than that employed by the court below. However, we do not agree with the district court that the MDC Plaintiffs have adequately alleged this claim against Zenk.

Our conclusion focuses on allegations of mendacity by Hasty and Sherman regarding the basis for detaining the MDC Plaintiffs in the ADMAX SHU. The Complaint asserts that Hasty and Sherman "were aware that placing the 9/11 detainees in the ADMAX SHU unit without an individualized determination of dangerousness or risk was unlawful." Compl. ¶ 74. However, these Defendants never actually undertook that "required individualized assessment." *Id.* ¶ 73. Nevertheless, Hasty and Sherman approved a document that "untruthfully stated that the executive staff at [the] MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id.* ¶ 74. In fact, neither Hasty nor Sherman "saw or considered information in any of these categories in deciding to place the 9/11 detainees in the ADMAX

SHU." *Id.*;[40] *see also id.* ¶¶ 68-72 (Hasty and Sherman held the MDC Plaintiffs in the ADMAX SHU knowing that they were not tied to terrorism and without performing the required individualized assessment of whether Plaintiffs posed a danger to the facility).

Based on the foregoing allegations of duplicity regarding the basis for confining the 9/11 detainees, it is reasonable to infer that Hasty and Sherman approved this false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU based on discriminatory intent. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (in the employment discrimination context, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"); *id.* (an inference of discriminatory purpose based on an employer's false explanation "is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt" (internal quotation marks omitted)); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) ("disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may . . . show intentional

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[40] As previously noted, the term "9/11 detainees" is defined in the Complaint as noncitizens from the Middle East, South Asia, and elsewhere who are Arab or Muslim, or were perceived to be Arab or Muslim. Individuals with certain of these characteristics who were arrested and detained in response to the 9/11 attacks constitute the putative class in this case.

discrimination" in the employment discrimination context).

The dissent argues that we cannot infer discriminatory intent from the MDC Defendants' approval of this false document, concluding that the "more likely" reason for this mendacity is these Defendants' concern for national security. *See* Dissenting Op., *post* at 299-300. Although recognizing that the MDC Defendants might be faulted for approving a false document stating that each detainee had been assessed as a "High Security" "suspected terrorist[ ]," our dissenting colleague believes Hasty and Sherman's actions are more likely explained by reliance on the FBI's designation of each MDC Plaintiff as a person "of interest" or "of high interest" to the ongoing terrorism investigation. Yet, the allegations in the Complaint belie this alternative explanation for Hasty and Sherman's dishonesty. Plaintiffs allege that the "MDC Defendants were aware that the FBI had not developed *any information*" to tie the 9/11 detainees to terrorism. Compl. ¶ 69 (emphasis added). Indeed, the MDC Defendants received regular updates on the FBI's investigation, *including* the dearth of evidence connecting the 9/11 detainees to terrorism. Such briefing—placing Hasty and Sherman on repeated notice of the lack of any specific information justifying restrictive confinement in the ADMAX SHU—renders implausible the innocent explanation for their mendacity.

As an additional matter, the fact that the false document that Hasty and Sherman approved, on its face, applied to suspected terrorists and not just actual or perceived Arabs and Muslims does not undermine the reasonableness of the inference that these Defendants acted based on discriminatory intent. Plaintiffs allege that

Hasty and Sherman approved the document even though they had not performed the required individualized assessments and knew that keeping "the 9/11 detainees" in the ADMAX SHU without those assessments was unlawful. *Id.* ¶¶ 73-74. They further allege that, in approving the document, Hasty and Sherman failed to consider the past offenses, past terrorist activity, and inability to adapt to incarceration with respect to "the 9/11 detainees." *Id.* ¶ 74. Based on Plaintiffs' allegations about how the false document related in particular to the 9/11 detainees, a group the Complaint specifically defines on racial, ethnic, and religious grounds, *see id.* ¶ 1, it is reasonable to infer, at least at the motion to dismiss stage, that Hasty and Sherman lied in order to conceal an intent to discriminate on the basis of suspect classifications.

Further buttressing this inference, the Complaint asserts that MDC staff used racially, ethnically, and religiously charged language to refer to the MDC Plaintiffs. *See id.* ¶ 109 (MDC staff referred to the MDC Plaintiffs as terrorists and insulted their religion); *id.* ¶ 110 (Saeed Hammouda and others complained "that MDC staff called them 'camel[s]' "); *id.* ¶ 136 (MDC staff mocked Plaintiffs' prayers and interrupted their praying by "screaming derogatory anti-Muslim comments"); *id.* ¶ 218 (during his transport and processing Hammouda was called "Arabic asshole"). These allegations are supported by the OIG reports. *See* OIG Report at 144 (noting allegations that MDC officers used racial slurs); Supplemental OIG Report at 28-30 (concluding that some MDC staff verbally abused detainees based on their Muslim faith, among other grounds).

The context in which the term "terrorist" was used at the MDC bolsters the inference that the MDC Plaintiffs

were believed to be terrorists simply because they were, or were perceived to be, Arab or Muslim. Significantly, the term "terrorist" was not used in isolation. Rather, MDC staff called the MDC Plaintiffs "'fucking Muslims' and 'terrorists,'" Compl. ¶ 147, as well as "'terrorist' and 'Arabic asshole,'" *id.* ¶ 218; *see also* Supplemental OIG Report at 28 (noting that along with the term "terrorists," MDC staff referred to detainees as "fucking Muslims" and "bin Laden Junior" (internal quotation marks omitted)).

While most of the aforementioned comments are not directly attributed to Hasty, Sherman, or Zenk, Plaintiffs do allege that the use of racially, ethnically, and religiously charged language was brought to the attention of the MDC Defendants through detainee complaints and reports from MDC staff, among other means. Mere knowledge of the MDC staff's discriminatory comments, of course, is insufficient to infer shared discriminatory intent by Hasty, Sherman, or Zenk. *See Iqbal*, 556 U.S. at 676-77, 129 S. Ct. 1937. However, with respect to Hasty, Plaintiffs allege more than mere awareness of the MDC staff's discriminatory treatment of the MDC Plaintiffs. Plaintiffs claim that Hasty fostered the MDC staff's use of discriminatory language to refer to the MDC Plaintiffs by himself "referring to the detainees as 'terrorists,'" Compl. ¶ 77, *see also id.* ¶ 109, notwithstanding Hasty's knowledge that the MDC Plaintiffs lacked ties to terrorism. Hasty's knowledge about the charged manner in which the term "terrorist" was used to refer to the MDC Plaintiffs, and his personal use of the term in that context, renders even more plausible the conclusion that he approved the false document justifying the MDC Plaintiffs' detention in the ADMAX SHU based on discriminatory animus. Given the fact that the 9/11 hijackers were Arab

Muslims, and Hasty knew that there were no articulable ties between the MDC Plaintiffs and terrorism, Plaintiffs plausibly plead that Hasty referred to the MDC Plaintiffs as terrorists, and treated them as if they were, simply because they were, or he believed them to be, Arab or Muslim.

In view of the foregoing, the MDC Plaintiffs have stated a plausible claim that Hasty and Sherman detained them in the challenged conditions because of their race, ethnicity, religion, and/or national origin. These Defendants' approval of the false document, and Hasty's use of charged language in the particular context of the MDC Plaintiffs' detention, support the reasonable inference that Hasty and Sherman subjected the MDC Plaintiffs to harsh conditions of confinement based on suspect classifications.

With respect to Zenk, the MDC Plaintiffs' allegations are more limited and fail to support the reasonable inference that he established or implemented the alleged conditions of confinement based on animus that offends notions of equal protection.

D. Qualified Immunity

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' equal protection claim. With regard to the first prong of this inquiry, whether the complaint plausibly pleads that a defendant personally violated the plaintiff's constitutional rights, for the reasons stated above, the MDC Plaintiffs have plausibly alleged that Ashcroft, Mueller, Ziglar, Hasty, and Sherman violated their rights under the equal protection guarantee.

With respect to the second prong of the inquiry, it was clearly established at the time of Plaintiffs' detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin. Plaintiffs' right "not to be subjected to ethnic or religious discrimination[ ] w[as] . . . clearly established prior to 9/11, and . . . remained clearly established even in the aftermath of that horrific event." *Hasty*, 490 F.3d at 160. In *Hasty*, the plaintiff alleged "that he was deemed to be 'of high interest,' and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion," and "that Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." *Id.* at 174 (alterations in original). We concluded "that any reasonably competent officer would understand [those alleged actions] to have been illegal under prior case law." *Id.* (internal quotation marks omitted). There is no reason that this analysis should not govern here. Although, as the dissent notes, *see* Dissenting Op., *post* at 290, *Hasty* employed a more lenient pleading standard than what we now utilize in assessing factual allegations, this hardly prevents us from relying on its conclusions as to whether certain legal principles were clearly established at the time of Plaintiffs' detention. Accordingly, in view of the sufficiency of the MDC Plaintiffs' allegations here, the DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim.

We reverse the portion of the district court's decision that dismissed the MDC Plaintiffs' equal protection claim against the DOJ Defendants, affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' claim, and reverse the district court's

decision denying Zenk's motion to dismiss the equal protection claim.

Because the Passaic Plaintiffs were held in the general population and not the ADMAX SHU, we agree with the district court that they have failed to adequately plead that they were subjected to harsh conditions of confinement because of their race, ethnicity, religion, and/or national origin. Thus, we affirm the district court's dismissal of the Passaic Plaintiffs' equal protection claim.

V. Claim 6: Unreasonable and Punitive Strip Searches

The MDC Plaintiffs claim that they were subject to unreasonable and strip searches while detained at the MDC, in violation of the Fourth and Fifth Amendments.[41]

A. Applicable Legal Standard

Determining the legal standard that applies to this claim turns on whether the MDC Plaintiffs were held in a prison or a jail. *See Hasty*, 490 F.3d at 172. In *Hasty*, we decided that the plaintiff, who was detained in the ADMAX SHU at the MDC (like the MDC Plaintiffs here), should be treated in accordance with the standard governing prisons. *See id.* Under that standard, a "regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Given that the

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[41] Only the MDC Plaintiffs assert this claim, which is only raised against the MDC Defendants. Benatta and Hammouda alone assert this claim against Zenk. To the extent that the MDC Plaintiffs' allegations regarding the strip searches are cognizable under the Fifth Amendment, we factor these allegations into our analysis of the substantive due process claim, which is discussed above. *See supra* Section III.C.

parties here do not argue for a different standard, we assume that the foregoing standard applies in this case.[42]

B. The MDC Defendants

The MDC Plaintiffs allege that Defendant Joseph Cuciti, a former lieutenant at the MDC and not a party on appeal, was tasked with "developing the strip-search policy on the ADMAX [SHU]." Compl. ¶ 111. Plaintiffs further claim that "Hasty ordered . . . Cuciti to design extremely restrictive conditions of confinement." *Id.* ¶ 75. The reasonable inference based on these allegations is that Hasty ordered Cuciti to develop the strip-search policy, which was "then approved and implemented by Hasty and Sherman, and, later, by Zenk." *Id.*

Plaintiffs allege that the 9/11 detainees at the MDC were strip searched upon arrival, and again after they had been escorted in shackles and under continuous guard to the ADMAX SHU. They were also strip searched every time they were taken from or returned to their cells, including after non-contact attorney visits, when "physical contact between parties was prevented by a clear partition," OIG Report at 123, and when being transferred from one cell to another. Benatta was strip searched on September 23, 24, and 26 of 2001, even though he was not

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[42] We note, however, that this standard governs prison regulations, *see Turner*, 482 U.S. at 89, 107 S. Ct. 2254, and that the application of this standard in *Hasty* may have been justified because the plaintiff in that case faced criminal charges (apparently felonies), *see* 490 F.3d at 147-48 & n.1, 162 n.8, 172. In contrast, Plaintiffs here were almost exclusively charged with civil immigration violations and were detained on that basis. While it may be that a different standard, one more favorable to detainees, should govern the constitutionality of searches in the context of civil immigration detention, we leave that question for another day.

let out of his cell on any of those days. Numerous strip searches were documented in a "visual search log" that was created for review by MDC management, including Hasty. Compl. ¶ 114 (internal quotation marks omitted).

Plaintiffs' allegations regarding the strip searches are supported by the Supplemental OIG Report, which concluded that MDC staff "inappropriately used strip searches to intimidate and punish detainees." Supplemental OIG Report at 35. That report also "questioned the need for the number of strip searches, such as after attorney and social visits in non-contact rooms." *Id.*

The foregoing allegations, supported as they are by the Supplemental OIG Report, are sufficient to establish at this stage of the litigation that Hasty and Sherman were personally involved in creating and executing a strip-search policy that was not reasonably related to legitimate penological interests. Hasty ordered the policy, and both he and Sherman approved and implemented it. Under that policy, the MDC Plaintiffs were strip searched when there was no possibility that they could have obtained contraband. Plaintiffs have alleged that Hasty and Sherman were aware of these searches either based on the search log that was created for review by MDC management, or because they were involved in the implementation of the strip-search policy.[43] These allega-

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[43] To the extent the dissent believes that we premise Hasty and Sherman's personal involvement entirely on these Defendants' alleged review of the visual search log, *see* Dissenting Op., *post* at 302, that assertion is incorrect. As discussed, Plaintiffs have plausibly alleged that Hasty ordered the development of, and that he and Sherman approved and implemented, the challenged strip-search policy. Plaintiffs' allegations regarding the visual search log only buttress the inference of Hasty's personal involvement.

tions give rise to a plausible Fourth Amendment claim against Hasty and Sherman. *See Hasty*, 490 F.3d at 172 (finding a plausible allegation of a Fourth Amendment violation in the post-9/11 context where the plaintiff alleged that he "was routinely strip searched twice after returning from the medical clinic or court and that, on one occasion, [he] was subjected to three serial strip and body-cavity searches in the same room"); *Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (noting that because "there was no possibility that [the plaintiff] could have obtained and concealed contraband[ ] . . . the second search appears to have been unnecessary").[44]

With respect to Zenk, however, the MDC Plaintiffs fail to state a plausible Fourth Amendment claim. As noted earlier, Plaintiffs do not assert any claim against Zenk for injuries they suffered prior to the date on which he became Warden of the MDC, which was April 22, 2002. Only two Plaintiffs, Benatta and Hammouda, were still detained at the MDC as of that date. These Plaintiffs

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[44] Although the dissent correctly notes that *Hodges* was decided before the Supreme Court's opinion in *Turner*, *see* Dissenting Op., *post* at 257, we have ratified *Hodges* in subsequent strip search case law. *See Hasty*, 490 F.3d at 172; *N.G. v. Connecticut*, 382 F.3d 225, 233-34 (2d Cir. 2004). Similarly, we reject the dissent's attempt to confine *Hodges* to its facts, only finding the absence of a legitimate penological purpose where the strip searches are "*immediately* successive." Dissenting Op., *post* at 257 (emphasis added). Like previous panels, we read *Hodges* as holding that a search may be unnecessary and purposeless where "there was no possibility that [the plaintiff] could have obtained and concealed contraband." 712 F.2d at 35; *see also N.G.*, 382 F.3d at 233-34. Here, consistent with *Hodges*, Plaintiffs have plausibly alleged that they were strip searched when there was no opportunity to acquire contraband, including in instances where they were shackled and under escort, or were never permitted to leave their cells.

have not sufficiently alleged that they were unlawfully strip searched during the period in which Zenk was Warden of the MDC.

C. Qualified Immunity

Hasty and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' strip search claim. With respect to the first prong of the qualified immunity analysis, Plaintiffs have plausibly alleged that Hasty and Sherman each violated the MDC Plaintiffs' rights under the Fourth Amendment. With regard to the second prong of the inquiry, Plaintiffs' Fourth Amendment rights were clearly established at the time of the searches at issue.

In *Hasty*, we denied Hasty qualified immunity on the plaintiff's Fourth Amendment claim, stating that in the wake of 9/11 "it was clearly established that even the standard most favorable to prison officials required that strip and body-cavity searches be rationally related to legitimate government purposes." 490 F.3d at 172; *see also id.* at 159-60 (the "right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches" was "clearly established prior to 9/11, and ... remained clearly established even in the aftermath of that horrific event"). Because the MDC Plaintiffs' claim here is substantially the same as the Fourth Amendment claim at issue in *Hasty*, we are bound by that decision and thus deny Hasty and Sherman qualified immunity on the Fourth Amendment claim in this case.

Accordingly, we affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' Fourth Amendment strip search claim, and reverse

the district court's denial of Zenk's motion to dismiss this claim.

VI. Claim 7: Conspiracy Under 42 U.S.C. § 1985

Plaintiffs' final claim is that Defendants conspired to deprive them of their rights in violation of 42 U.S.C. § 1985(3).

A. Applicable Legal Standard

A conspiracy claim under Section 1985(3) has four elements: "(1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen." *Hasty*, 490 F.3d at 176.[45] In addition, this claim requires that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); *accord Reynolds v. Barrett*, 685 F.3d 193, 201-02 (2d Cir. 2012).

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[45] Section 1985(3) of Title 42 of the United States Code provides, in pertinent part, that:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

B. The Sufficiency of the Allegations

In this case, the MDC Plaintiffs have sufficiently alleged that Ashcroft, Mueller, and Ziglar met regularly and eventually agreed to subject the detainees to the challenged conditions of confinement by merging, and complying with the merger of, the New York List. The MDC Plaintiffs have also plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim, as we conclude above in our analysis of the equal protection claim. With respect to Hasty and Sherman, their joint approval of the false document without performing the requisite individualized assessment supports the reasonable inference that these two Defendants came to an agreement to and did subject Plaintiffs to harsh conditions of confinement based on the discriminatory animus required by Section 1985(3).

Plaintiffs also allege an agreement, albeit not an explicit one, among the DOJ Defendants and Hasty and Sherman to effectuate the harsh conditions of confinement with discriminatory intent. Such a tacit agreement can suffice under Section 1985(3). *See Webb v. Goord*, 340 F.3d 105, 110-11 (2d Cir. 2003). The Complaint asserts that the conditions of confinement at the MDC "were formulated in consultation with the FBI." Compl. ¶ 65. In addition, Hasty ordered, and Hasty and Sherman approved and implemented, the conditions of confinement "[t]o carry out Ashcroft, Mueller[,] and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment." *Id.* ¶ 75; *see also id.* ¶ 68. The foregoing allegations are sufficient to support the reasonable inference that the DOJ Defendants, Hasty, and Sherman shared such a tacit

understanding about carrying out the unlawful conduct with respect to the MDC Plaintiffs' detention.

Accordingly, the MDC Plaintiffs' allegations state a plausible claim for a Section 1985(3) conspiracy against Ashcroft, Mueller, Ziglar, Hasty, and Sherman.

C. The Intracorporate Conspiracy Doctrine

The MDC Defendants argue that they are legally incapable of conspiring with each other, and with the DOJ Defendants, because they are all part of the same governmental entity—the DOJ. In *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70-72 (2d Cir. 1976), we recognized that the defendants—officers and directors of a single corporation, and the corporation itself—could not legally conspire with one another in violation of Section 1985(3). We reached that conclusion because the defendants formed a "single business entity with a managerial policy implemented by the one governing board." *Id.* at 71. Thus, the defendants could not satisfy the statutory requirement of a conspiracy between two or more persons. *Id.* We also noted, however, that where various entities in a single institution have "disparate responsibilities and functions," a conspiracy claim could lie because the actions of those entities would not be "actions of only one policymaking body." *Id.*

Assuming that Defendants can ultimately invoke the intracorporate conspiracy doctrine in this case, at this stage of the litigation, we cannot conclude that Ashcroft, Mueller, Ziglar, Hasty, and Sherman acted as members of a single policymaking entity for purposes of the MDC Plaintiffs' Section 1985(3) conspiracy claim. According to the Complaint, the former Attorney General, the former Director of the FBI, the former Commissioner of the

INS, and the former Warden and Associate Warden at the MDC had varied responsibilities and functions that distinguish them from the single corporate entity in *Girard*. Although Hasty and Sherman may have acted, at least in part, to implement the DOJ Defendants' policy, it is also the case that Hasty and Sherman themselves established policies at the MDC. Thus, factual questions about how disparate or distinct Defendants' functions were, and how policy was created by the various Defendants, preclude us from deciding as a matter of law that Defendants resemble the single policymaking body of a corporation.[46]

D. Qualified Immunity

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim. First, the MDC Plaintiffs have plausibly alleged a Section 1985(3) conspiracy claim against these Defendants. In addition, as we concluded in *Hasty*, in the wake of the 9/11 attacks, "even without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." 490 F.3d at 177. In that case, we denied the de-

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[46] We note that the BOP and, therefore, the MDC, are subject to the supervision of the Attorney General. *See* 18 U.S.C. § 4041. We have also found one unpublished district court decision that concludes that the Attorney General and employees of a BOP facility cannot conspire together under Section 1985. *See Chesser v. Walton*, No. 12-cv-01198-JPG, 2013 WL 1962285, at *3 (S.D. Ill. May 10, 2013). However, for the reasons stated above, neither this statutory provision nor district court case satisfy us that Defendants here were sufficiently similar to the members of a single corporate policymaking body such that the intracorporate conspiracy doctrine should apply.

fendants qualified immunity on the Section 1985(3) claim. *See id.* Given the sufficiency of the allegations in this case, our qualified immunity decision in *Hasty* controls here.

Accordingly, we reverse the district court's dismissal of the Section 1985(3) claim against the DOJ Defendants and affirm the denial of Hasty and Sherman's motions to dismiss this claim. Because the MDC Plaintiffs fail to adequately plead that Zenk acted with discriminatory animus, we reverse the denial of Zenk's motion to dismiss the conspiracy claim. This claim is also dismissed with respect to the Passaic Plaintiffs, as they fail to adequately plead that Defendants acted with the requisite discriminatory animus.

VII. Final Thoughts

If there is one guiding principle to our nation it is the rule of law. It protects the unpopular view, it restrains fear-based responses in times of trouble, and it sanctifies individual liberty regardless of wealth, faith, or color. The Constitution defines the limits of the Defendants' authority; detaining individuals as if they were terrorists, in the most restrictive conditions of confinement available, simply because these individuals were, or appeared to be, Arab or Muslim exceeds those limits. It might well be that national security concerns motivated the Defendants to take action, but that is of little solace to those who felt the brunt of that decision. The suffering endured by those who were imprisoned merely because they were caught up in the hysteria of the days immediately following 9/11 is not without a remedy.

Holding individuals in solitary confinement twenty-three hours a day with regular strip searches because

their perceived faith or race placed them in the group targeted for recruitment by al Qaeda violated the detainees' constitutional rights. To use such a broad and general basis for such severe confinement without any further particularization of a reason to suspect an individual's connection to terrorist activities requires certain assumptions about the "targeted group" not offered by Defendants nor supported in the record. It assumes that members of the group were already allied with or would be easily converted to the terrorist cause, until proven otherwise. Why else would no further particularization of a connection to terrorism be required? Perceived membership in the "targeted group" was seemingly enough to justify extended confinement in the most restrictive conditions available.

Discovery may show that the Defendants—the DOJ Defendants, in particular—are not personally responsible for detaining Plaintiffs in these conditions. But we simply cannot conclude at this stage that concern for the safety of our nation justified the violation of the constitutional rights on which this nation was built. The question at this stage of the litigation is whether the MDC Plaintiffs have plausibly pleaded that the Defendants exceeded the bounds of the Constitution in the wake of 9/11. We believe that they have.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the district court's decision on Defendants' Rule 12(b)(6) motions. More specifically, we conclude that: (1) the MDC Plaintiffs have plausibly alleged a substantive due process claim against the DOJ Defendants, against Hasty with regard to both official and unofficial conditions, and against Sherman with regard to

official conditions only, and these Defendants are not entitled to qualified immunity on this claim; (2) the MDC Plaintiffs have plausibly alleged an equal protection claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (3) the free exercise claim is dismissed as to all Defendants; (4) the MDC Plaintiffs have plausibly alleged their Fourth Amendment strip search claim against Hasty and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (5) the MDC Plaintiffs have plausibly alleged the Section 1985(3) conspiracy claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; and (6) the MDC Plaintiffs have not plausibly alleged any claims against Zenk. We affirm the dismissal of the claims brought by the Passaic Plaintiffs.

The Clerk of the Court is directed to enter an order consistent with these conclusions, AFFIRMING in part and REVERSING in part, and REMANDING the matter to the district court for further proceedings consistent with this opinion.

REENA RAGGI, Circuit Judge, concurring in part in judgment and dissenting in part:

Today, our court becomes the first to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials—the Attorney General of the United States and the Director of the Federal Bureau of Investigation ("FBI")—for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11,

2001 ("9/11").[1] I respectfully dissent from this extension of *Bivens* to a context not previously recognized by Supreme Court or Second Circuit precedent. I do not suggest that executive action in this, or any other, context is not subject to constitutional constraints. I conclude only that when, as here, claims challenge official executive policy (rather than errant conduct by a rogue official—the typical *Bivens* scenario), and particularly a national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country, Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages.

Even if a *Bivens* action were properly recognized in this context—which I submit it is not—I would still dissent insofar as the majority denies qualified immunity to five former federal officials, Attorney General John Ashcroft, FBI Director Robert Mueller, Immigration and Naturalization Service ("INS") Commissioner James Ziglar ("DOJ Defendants"), Metropolitan Detention Center ("MDC") Warden Dennis Hasty, and Associate Warden James Sherman ("MDC Defendants"), on plaintiffs' policy-challenging claims of punitive and discriminatory confinement and unreasonable strip searches.

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[1] To date, four Courts of Appeals—for the Fourth, Seventh, Ninth, and D.C. Circuits—have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks. *See Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (*en banc*); *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2012); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *see also Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

The majority does narrow these claims by allowing their pursuit only (1) by those aliens confined in the MDC's most restrictive housing unit, the "ADMAX SHU" ("MDC Plaintiffs"); and (2) for restrictive confinement after defendants purportedly learned that plaintiffs were being detained without individualized suspicion of their connection to terrorism. *See* Majority Op., *ante* at 239, 269. Even with the claims so narrowed, however, I think defendants are entitled to qualified immunity because plaintiffs fail to plead plausible policy-challenging claims that were clearly established at law in the period September 2001 to April 2002, when one or more MDC Plaintiffs were confined in the ADMAX SHU. As the majority acknowledges, the 9/11 attacks killed 3,000 people and presented "unrivaled challenges and severe exigencies" for the security of the nation. Majority Op., *ante* at 234. The law did not then clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted for recruitment by al Qaeda—in restrictive (as opposed to general) confinement pending FBI–CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not sure that conclusion is clearly established even now.

Accordingly, because I conclude both that a *Bivens* remedy should not be extended to plaintiffs' policy-challenging claims and that the DOJ and MDC defendants are entitled, in any event, to qualified immunity, I

dissent from the majority's refusal to dismiss these claims.[2]

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[2] In concluding its opinion, the majority asserts that plaintiffs' claims cannot be dismissed because "[i]f there is one guiding principle to our nation it is the rule of law." Majority Op., *ante* at 264. The rule of law, however, is embodied not only in amendments to the Constitution, but also, and first, in that document's foundational structure of separated powers. *See* 1 Annals of Cong. 581 (1789) (reporting Madison's statement in first Congress that "if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers"); *see also* Mass. Const. of 1780, Part the First, art. XXX (John Adams) (separating powers "to the end it may be a government of laws, and not of men"); *Bowsher v. Synar*, 478 U.S. 714, 721-22, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986) (observing that "declared purpose of separating . . . powers of government, of course, was to 'diffus[e] power the better to secure liberty,'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring))). Thus, it is the rule of law that demands that a court do more than identify a possible wrong; it must consider what authority the judiciary has to imply a remedy—specifically, a damages remedy—in the absence of legislative action. *See The Federalist No. 47*, at 251-52 (James Madison) (Carey & McClellan, ed. 2001) (quoting Montesquieu's maxim that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator"); *INS v. Chadha*, 462 U.S. 919, 951, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (stating that "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted"); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 Colum. L. Rev. 1687, 1707 (2004) (observing that "threshold question" for judge is not, "How should I resolve this case?" but "To whom does the Constitution entrust the resolution of this issue?").

It is also the rule of law—to which both sides in a lawsuit have a right—that requires a court to consider whether certain defenses, such as qualified immunity, shield a particular defendant in any

I. *Bivens Should Not Be Extended to Plaintiffs' Policy-Challenging Claims*

A. *The Narrow Scope of Bivens Actions*

On three occasions in the decade between 1971 and 1980, the Supreme Court implied directly from the Constitution private damages actions against federal officials for alleged violations of rights. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (implying action for unlawful arrest and excessive force in arrest from Fourth Amendment prohibition of unreasonable searches and seizures); *accord Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (implying action for deliberate indifference to prisoner's medical needs from Eighth Amendment prohibition of cruel and unusual punishment); *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (implying action for sex discrimination in federal employment from equal protection component of Fifth Amendment). The Court has never done so again. Instead, it has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001), emphasizing that "implied causes of actions are disfavored," *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and "in most in-

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event from a suit for damages. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 231-32, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (reiterating that qualified immunity should be decided at earliest possible stage of litigation because it is immunity from suit, not just liability).

Thus, the rule of law animates this dissent no less than the majority opinion.

stances . . . unjustified," *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007).

This reluctance to extend *Bivens* is grounded in our constitutional structure of separated powers. As the Supreme Court has explained, deciding whether to extend *Bivens* focuses not on "the merits of the particular remedy" sought, but on "who should decide whether such a remedy should be provided," specifically, the legislative branch of government, Congress, or the adjudicative branch, the judiciary. *Bush v. Lucas*, 462 U.S. 367, 380, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). For more than thirty years now, the Supreme Court has invariably answered that question in favor of Congress. *See, e.g., Wilkie v. Robbins*, 551 U.S. at 562, 127 S. Ct. 2588 ("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act in the public's behalf." (quoting *Bush v. Lucas*, 462 U.S. at 389, 103 S. Ct. 2404)).

Heeding this precedent, our own court, *en banc*, has stated "that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (*en banc*) (internal quotation marks omitted). Most particularly, it should not be applied in a new context if any alternative process is available to address the claimed constitutional interest or if "special factors" counsel hesitation in recognizing a new damages action. *Bush v. Lucas*, 462 U.S. at 378, 103 S. Ct. 2404; *accord Minneci v. Pollard*, — U.S. —, 132 S. Ct. 617, 621, 181 L. Ed. 2d 606 (2012); *Wilkie v. Robbins*, 551 U.S. at 550, 127 S. Ct. 2588; *Arar v. Ashcroft*, 585 F.3d at 572 (collecting cases). In short, a *Bivens* remedy is never "an automatic entitlement"; it "has to represent a judgment about the best way to implement a

constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. at 550, 127 S. Ct. 2588.

Applying these principles here, I conclude that plaintiffs' constitutional challenges to an alleged executive policy for confining lawfully arrested illegal aliens in the aftermath of the 9/11 attacks cannot pass the stringent test for recognizing a *Bivens* action. In holding otherwise, the panel majority maintains that plaintiffs' challenges to the conditions of their confinement—with the exception of their Free Exercise challenge—"stand[ ] firmly within a familiar *Bivens* context," thus avoiding the need to consider factors counseling hesitation or alternative remedies. Majority Op., *ante* at 234-35, 236-37.[3] The majority can reach that conclusion, however, only by fashioning a new standard for construing the few recognized *Bivens* contexts that employs an impermissibly "high level of generality." *Wilkie v. Robbins*, 551 U.S. at 561, 127 S. Ct. 2588 (cautioning against such construction); *accord Arar v. Ashcroft*, 585 F.3d at 572. I respectfully disagree with that analysis.[4]

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[3] I concur in the panel judgment dismissing plaintiffs' Free Exercise challenge. *See* Majority Op., *ante* at 236-37. Not only has the Supreme Court consistently declined to extend a *Bivens* remedy to a First Amendment claim in *any* context, *see, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), but also Congress has provided alternative relief under the Religious Freedom Restoration Act, *see* 42 U.S.C. § 2000bb *et seq.*

[4] I dissent from the majority's allowance of *Bivens* claims against *both* the DOJ and the MDC Defendants even though the former group, having secured dismissal on other grounds in the district court, did not renew their *Bivens* challenge in defending that judgment on appeal. No matter. We can affirm on any ground supported by the record, *see Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014), and the lists-merger theory on

B. Plaintiffs' Claims Do Not Arise in an Established Bivens Context

1. *The Arar v. Ashcroft Standard for Identifying Bivens Context Is Holistic and Cannot Be Reduced to Two Factors*

In deciding whether a claim arises in a previously recognized *Bivens* context, this panel is bound by our court's *en banc* decision in *Arar v. Ashcroft*, which defines "context" as "a potentially recurring scenario that has similar legal and factual components." 585 F.3d at 572. The majority pays lip service to this definition, *see* Majority Op., *ante* at 234, but then significantly narrows it to demand commonality only as to the "rights injured" and the "mechanism of injury," *id.* at 235. This substitution cannot be reconciled with controlling precedent.

Arar's definition of context is unqualified, contemplating a careful, holistic examination of all legal and factual components of the "scenario" in which a claim arises to see if it is, indeed, a recurrent example of a previously recognized *Bivens* context. *Arar v. Ashcroft*, 585 F.3d at 572. Such an inquiry does not denominate any particular factors—such as the "rights injured" or "mechanism of injury"—as determinative. Nor does it pronounce other factors—such as a challenge to an executive policy, implicating the exercise of national security and immigration authority in a time of crisis—irrelevant.[5]

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which the majority reverses dismissal was never advanced by plaintiffs' in either the district court or on appeal, *see infra* at 243 n.28.

[5] In pronouncing the national security challenges following the 9/11 attacks irrelevant to a *Bivens* context determination, the majority cites *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd in part sub nom. Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *See* Majority Op., *ante* at 234. That reli-

By doing both here, the majority not only fails to conduct the full inquiry mandated by *Arar's* definition of context. It also fails to heed the Supreme Court admonition that animates the *Arar* definition, *i.e.*, that a *Bivens* remedy—generally "disfavored," *Ashcroft v. Iqbal*, 556 U.S. at 675, 129 S. Ct. 1937, and usually "unjustified," *Wilkie v. Robbins*, 551 U.S. at 550, 127 S. Ct. 2588—is never "an automatic entitlement" but, rather, the product of a considered "judgment about the best way to implement a constitutional guarantee" in particular circumstances, *id.* Such a judgment necessarily requires more than the general identification of a constitutional right or a mechanism of injury. It demands consideration of all factors counseling for and against an implied damages action in the specific legal and factual circumstances presented.

It is precisely because a *Bivens* judgment is made only after weighing all factors relevant to a given scenario that, when another case arises presenting similar legal and factual components, a court need not repeat the process. But where a proposed *Bivens* claim presents legal and factual circumstances that were *not* present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite "judgment" that a judicially implied damages remedy is "the best way" to implement constitutional guarantees in *that* context. *Wilkie v. Robbins*, 551 U.S. at 550, 127 S. Ct. 2588.

That is the concern here. No court has ever made the judgment that an implied damages remedy is the best

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ance is misplaced because it conflates the question of clearly established *rights*—the qualified immunity concern at issue in *Iqbal v. Hasty*, 490 F.3d at 159—with the distinct *Bivens* question of previously established *context*.

way to implement constitutional guarantees of substantive due process, equal protection, and reasonable search when lawfully arrested illegal aliens challenge an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority. In the absence of a judgment made in *that* context, the majority cannot conclude that a *Bivens* remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other *Bivens* cases. Indeed, because rights and mechanisms of injury can arise in a variety of circumstances, presenting different legal and factual components, these two factors cannot alone identify context except at an impermissibly high level of generality. *See Wilkie v. Robbins*, 551 U.S. at 561, 127 S. Ct. 2588; *Arar v. Ashcroft*, 585 F.3d at 572.

This generality concern is only exacerbated by the majority's apparent willingness to mix and match a "right" from one *Bivens* case with a "mechanism of injury" from another and to conclude that wherever such a right and such a mechanism of injury are paired together, the resulting *Bivens* claim arises in an established context. *See* Majority Op., *ante* at 231-36; 237. The problem is that no court has previously made the requisite judgment with respect to that pairing, much less made it in a legal and factual scenario similar to the one presented here.

2. *The Majority Cites No Case Affording a Bivens Remedy in a Scenario Legally and Factually Similar to that Presented Here*

a. *Punitive Confinement Claim*

The majority cites two cases, *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, and *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006), in which federal prisoners were allowed to maintain *Bivens* actions for injuries sustained in confinement. *See* Majority Op., *ante* at 235-36. But in each case, the claim asserted was deliberate indifference to the prisoner's particular medical needs. That scenario is neither legally nor factually similar to a substantive due process claim of punitive pre-trial confinement implied from allegedly purposeless restrictions. *See generally Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).[6] Indeed, the difference in context is only highlighted by law affording prison authorities considerable discretion in establishing confinement policies. *See generally Florence v. Bd. of Chosen Freeholders*, — U.S. —, 132 S. Ct. 1510, 1517, 182 L. Ed. 2d 566 (2012).

Deliberate indifference to an individual inmate's particular health needs was also the basis for the constitutional claim in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456. In that case, however, the Supreme Court declined to extend a *Bivens* remedy to such a claim when brought against a private corporation operating detention facilities under a contract with the Bureau of Prisons ("BOP"). *See id.* at

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[6] When, in *Bell v. Wolfish*, the Supreme Court discussed the substantive due process prohibition on punitive pre-trial confinement, it did so on a petition for a writ of habeas corpus, not in a *Bivens* action. *See* 441 U.S. at 526, 528, 99 S. Ct. 1861.

74, 122 S. Ct. 515. Thus, the *Malesko* observation cited by the majority—that "[i]f a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officers, subject to the defense of qualified immunity," Majority Op., *ante* at 235 (quoting *Malesko*, 534 U.S. at 72, 122 S. Ct. 515)—cannot be read apart from the context in which it was made. It would, in fact, be extraordinary to conclude that in a deliberate indifference case such as *Malesko*, in which all claims against individuals had been dismissed, and in which the Supreme Court declined to extend *Bivens* to the private corporate defendant, the Court was, nevertheless, using a single sentence of *dictum* to sweep well beyond *Carlson* and to hold that *Bivens* remedies are available to federal prisoners raising any constitutional challenge to any aspect of their confinement against individual federal employees. Indeed, that reading is foreclosed in this circuit by *Arar*, which observed that *Carlson* extended *Bivens* to Eighth Amendment violations by prison officials, after which "the Supreme Court has declined to extend the *Bivens* remedy in any new direction *at all*." *Arar v. Ashcroft*, 585 F.3d at 571 (emphasis added).

In *Tellier v. Fields*, also cited by the majority, *ante* at 235, a prison inmate did seek a *Bivens* remedy for restrictive confinement, but the right he asserted was *procedural* not *substantive* due process. *See* 280 F.3d 69, 73 (2d Cir. 2000). In short, he complained that defendants had failed to follow controlling procedures for imposing prison discipline. He did not contend that the restrictive

conditions themselves were substantively unreasonable, a claim with quite different legal and factual components.[7]

In sum, the panel majority points to no case in which the Supreme Court or this court has yet extended a *Bivens* remedy to claims of punitive confinement by federal pre-trial detainees, and certainly not in the unprecedented context of a challenge to executive policy implicating the exercise of national security and immigration authority in a time of crisis.[8]

b. *Discriminatory Confinement Claim*

Nor does the majority cite to any case affording a *Bivens* remedy for alleged discriminatory conditions of confinement. The context of the single equal protection

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[7] This court has already dismissed procedural due process challenges to the confinement policy here at issue on grounds of qualified immunity. *See Iqbal v. Hasty*, 490 F.3d at 167-68.

[8] The majority cites two cases—not controlling on this court—that allowed federal detainees to pursue a *Bivens* remedy for restrictive confinement. *See Bistrian v. Levi*, 696 F.3d 352, 374-75 (3d Cir. 2012); *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), *abrogated on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (*en banc*). In neither case, however, did these courts assess "context" by reference to the standard we articulated in *Arar*. In fact, *Bistrian* conducted no *Bivens* extension analysis. Much less were these other circuit courts confronted with the circumstances contributing to the unique scenario presented here.

Insofar as the majority cites the *dissenting* opinion in *Arar* for the proposition that this court has "presumed the availability of a *Bivens* remedy for substantive due process claims," Majority Op., *ante* at 235 n.15 (citing *Arar*, 585 F.3d at 598 (Sack, J., dissenting)), it is, of course, not the dissent, but the *en banc* majority opinion in *Arar* that controls our context consideration here. For reasons already discussed, that controlling opinion requires us to look to more than the right alleged to identify an established *Bivens* context.

case cited, *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, was employment discrimination by a member of Congress. *See* Majority Op., *ante* at 235 n.15. That scenario bears almost no factual and legal similarity to the equal protection claim here, which is informed not only by the discretion afforded prison authorities in establishing confinement policies, *see generally Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. at 1517, but also by the particular circumstances of the 9/11 attacks, *see generally Ashcroft v. Iqbal*, 556 U.S. at 682, 129 S. Ct. 1937 (observing that because 9/11 attacks were ordered and conducted by Arab Muslims, it was "no surprise" that legitimate law enforcement policies to identify 9/11 assailants and to prevent future attacks "would produce a disparate incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims").

Even in the context of employment discrimination claims, the Supreme Court has been reluctant to construe *Davis v. Passman* to reach beyond its particular factual scenario, especially where factors—not present in *Davis*—counsel hesitation. *See Chappell v. Wallace*, 462 U.S. 296, 297-305, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) (declining to extend *Bivens* to enlisted soldiers' claims of race discrimination against commanding officers). If, as the majority seems to recognize, *Davis* cannot be construed to afford a *Bivens* remedy for every claim of *employment* discrimination, *see* Majority Op., *ante* at 235 n.15, it can hardly be understood to afford a *Bivens* remedy in the altogether different context of alleged *prison confinement* discrimination.

c. *Strip-Search Claim*

In challenging the strip-search component of their restrictive confinement, the MDC Plaintiffs invoke the

Fourth as well as the Fifth Amendment. The Fourth Amendment cases cited by the majority—*Bivens*, *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004), and *Castro v. United State*[illegible]4 F.3d 106 (2d Cir. 1994), *see* Majority Op., *ante* at 236-37—do not present scenarios similar to that here.

The potentially recurring scenario in *Bivens* was unlawful arrest, executed without probable cause and with excessive force. *See* 403 U.S. at 389, 91 S. Ct. 1999. That hardly represents a judgment that an implied *Bivens* damages action is the best way to vindicate *every* Fourth Amendment claim. *See* Majority Op., *ante* at 237. Rather, to come within the context established by *Bivens*, a Fourth Amendment claim must have legal and factual components akin to unlawful arrest. *See generally Arar v. Ashcroft*, 585 F.3d at 572. Plaintiffs here do not challenge their arrests, which were all supported by probable cause to believe that each detained alien had violated immigration laws, and which were all effected without undue force. Instead, plaintiffs challenge a policy of restrictive confinement (including strip searches) *after* lawful arrest.

As for *Groh* and *Castro*, the searches there at issue were of private residences, a factually distinct scenario presenting different legally cognizable expectations of privacy giving rise to different legal standards of constitutional reasonableness than those applicable to prison searches. *See Covino v. Patrissi*, 967 F.2d 73, 75 (2d Cir. 1992) (observing, in § 1983 action, that constitutionality of pre-trial detainee strip searches should be assessed under "legitimate penological interests" standard outlined in *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)); *accord Iqbal v. Hasty*, 490 F.3d at 172.

To summarize, I respectfully dissent from the majority's conclusion that plaintiff's policy-challenging claims to restrictive confinement arise in a familiar *Bivens* context because (1) to the extent the majority employs a rights-injury calculus to reach that conclusion, it construes context at an impermissibly high level of generality; and (2) no case cited by the plaintiffs or the majority has yet made the requisite judgment that a *Bivens* remedy is the best way to implement constitutional rights in a scenario with legal *and* factual components similar to those presented here. In short, the context here is "fundamentally different from anything recognized in *Bivens* or subsequent cases." *Correctional Servs. Corp. v. Malesko*, 534 U.S. at 70, 122 S. Ct. 515. Thus, this court must conduct the full analysis necessary to extend a *Bivens* remedy to a new context. Because the majority declines to do so, *see* Majority Op., *ante* at 237 n.17, I undertake that task here.

C. *Factors Counseling Against Extending Bivens to Plaintiffs' Policy-Challenging Claims*

Not only do the unique circumstances of this case not fall within an established *Bivens* context, but a number of those circumstances also counsel hesitation in extending a *Bivens* remedy here. *See Bush v. Lucas*, 462 U.S. at 378, 103 S. Ct. 2404 (instructing courts to pay "particular heed" to "any special factors counseling hesitation before authorizing a new kind of federal litigation"); *accord Minneci v. Pollard*, 132 S. Ct. at 621; *Wilkie v. Robbins*, 551 U.S. at 550, 127 S. Ct. 2588; *Arar v. Ashcroft*, 585 F.3d at 573 (characterizing "special factors" as "embracing category," which includes any circumstance provoking hesitation about propriety of court entertaining damages claim in absence of congressional action). I

discuss four factors in particular, the first three of which are inextricably intertwined: (1) plaintiffs challenge an official executive policy (rather than rogue action), implicating (2) the executive's immigration authority, (3) as well as its national security authority, and (4) Congress has afforded no damages remedy to 9/11 detainees despite awareness of the concerns raised here.

1. *Official Executive Policy*

Plaintiffs challenge what they themselves characterize as an official confinement policy propounded by the nation's two highest ranking law enforcement officials, the Attorney General and the FBI Director, in response to the national security threat raised by the terrorist attacks of 9/11. Neither plaintiffs nor the panel majority identifies any case affording a *Bivens* remedy in the context of a constitutional challenge to executive branch policy, and certainly not to policy made at the cabinet level. This is not surprising. A *Bivens* action has never been considered a "proper vehicle for altering an entity's policy." *Correctional Servs. Corp. v. Malesko*, 534 U.S. at 74, 122 S. Ct. 515. While *Malesko* made this observation in declining to extend *Bivens* to a suit against a corporate defendant, this court has recognized *en banc* that it applies with equal force to claims against individuals. As we explained in *Arar v. Ashcroft*, allowing a private party to maintain a *Bivens* action against federal officials for "policies promulgated and pursued by the executive branch, not simply isolated actions of individual federal employees . . . is without precedent and implicates questions of separation of powers as well as sovereign immunity." 585 F.3d at 578.

That admonition counsels particular hesitation here where the challenged confinement policy was purportedly

propounded and maintained not by rogue actors, *see Kreines v. United States*, 33 F.3d 1105, 1108 (9th Cir. 1994) (stating that *Bivens* actions are generally brought "against rogue officers who step outside the scope of their official duties"), but by persons specifically charged by the President with primary responsibility for homeland defense after 9/11.[9] In this regard, it is worth recalling that the confinement policy here at issue was not the only action taken by the nation in response to the security exigencies presented by the 9/11 attacks. Within a week, the United States went to war.[10] Defendants Ashcroft and Mueller were among those senior officials who served as the President's "war council," and it was in that context that they were charged with homeland defense.[11] These circumstances should only add to our hesitation in judicially implying a *damages* remedy against executive of-

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[9] *See The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States* ("9/11 Report") 333 (2004), *available at* http://1.usa.gov/1AMXOO4 (detailing President's written assignment of responsibility for homeland security after 9/11 to Attorney General Ashcroft, FBI Director Mueller, and CIA Director George Tenet); *see also* Jack Goldsmith, *The Terror Presidency* 75 (2007) (recounting that, at September 12, 2001 meeting of National Security Council, President Bush told Attorney General Ashcroft, "'Don't ever let this happen again,'" a "simple sentence" that "set the tone for everything Ashcroft's Justice Department would do in the aftermath of 9/11").

[10] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

[11] *See* 9/11 Report 330 (identifying Attorney General and FBI Director, along with Vice President, Secretaries of State and Defense, Chairman and Vice-Chairman of Joint Chiefs, National Security Advisor, CIA Director, and President's Chief of Staff, as "top advisers" convened by President on night of 9/11 and subsequently denominated by him as his "war council" in responding to terrorist attacks).

ficials who might well be understood to have been acting as "the hand of the president" in formulating policies responding to a national emergency.[12]

Nor is a different conclusion warranted here because subordinates of the Attorney General may have disagreed among themselves about the parameters of the challenged policy. *See* Majority Op., *ante* at 242.[13] As this court has recognized, a *Bivens* damages action is not the appropriate vehicle for reopening executive branch debates so that the judiciary can second-guess the final policy decision. *See Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008) (observing that "right of federal agencies to make discretionary decisions when engaged in disaster relief without the fear of judicial second-guessing" raises separation-of-powers concern cautioning hesitation in extending *Bivens* (internal quotation marks

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[12] In *Ponzi v. Fessenden*, 258 U.S. 254, 262, 42 S. Ct. 309, 66 L. Ed. 607 (1922), Chief Justice (and former President) Taft described the Attorney General as "the hand of the president" in protecting United States interests in legal proceedings.

[13] The majority locates evidence of disagreement between the FBI and INS with respect to the MDC Plaintiffs' continued restrictive confinement in the ADMAX SHU in an OIG Report's account of a November 2, 2001 meeting. *See* Dep't of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* ("OIG Report") 55-56 (April 2003), *available at* http://1.usa.gov/1ygkjKg. This is misleading. As I explain infra at 52-53, the OIG Report makes plain that the disagreement voiced by FBI and INS representatives at that meeting pertained *not* to whether illegal aliens detained at the MDC should continue to be held in the ADMAX SHU, but to whether New York list detainees (housed both restrictively at the MDC and in general population at the Passaic County Jail) should continue to be held at all.

omitted)). The Fourth Circuit reached that same conclusion in declining to extend *Bivens* to a due process challenge to the executive's designation of enemy combatants in the war on terrorism, a matter on which the FBI and Defense Department had allegedly disagreed. *See Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012). In so ruling, *Lebron* observed that the claims not only intruded on "past executive deliberations affecting sensitive matters of national security," but also risked chilling frank, future policy discussions in this area "shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability." *Id.* at 551.

As earlier stated, hesitation in extending *Bivens* does not suggest that federal policymakers—even those appointed by the President and of cabinet rank—are not bound by constitutional constraints. *See supra* at 224. It simply recognizes that where an executive policy is at issue, Congress, not the judiciary, is the branch best suited to decide whether a damages action is the appropriate vehicle for challenging that policy. *See Arar v. Ashcroft*, 585 F.3d at 574 (explaining that "federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a [judicially created] private action for money damages against individual policymakers is not one of them"); *see also Vance v. Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (*en banc*) (observing that "normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author").

2. *Implicating Executive's Immigration Authority*

Further removing plaintiffs' claims from any recognized *Bivens* context, and certainly counseling hesitation in extending a *Bivens* remedy, is the fact that the challenged policy implicates the executive's immigration authority. As the Supreme Court has stated—in general and not simply with respect to *Bivens*—"any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," matters "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" absent congressional authorization. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S. Ct. 512, 96 L. Ed. 586 (1952); *accord Arar v. Ashcroft*, 585 F.3d at 570.

The majority, however, concludes that plaintiffs' immigration status is irrelevant to assessing a *Bivens* context because illegal aliens have the same rights as citizens to be free from punitive or discriminatory conditions of confinement. *See* Majority Op., *ante* at 236. Whatever the merits of that conclusion generally, it begs the relevant *Bivens* extension question, which is not whether the Constitution affords illegal aliens certain rights coextensive with those of citizens, but whether a judicially implied damages remedy is the best way to implement such rights when the plaintiff is an illegal alien and not a citizen. *See Wilkie v. Robbins*, 551 U.S. at 550, 127 S. Ct. 2588; *Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (observing that "immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those afforded to citi-

zens," and declining to extend *Bivens* to illegal alien's claim of wrongful detention pending deportation).

Even assuming that in the familiar *Bivens* contexts of false arrest or deliberate indifference, the law were to conclude that the distinction between citizens and aliens did not counsel hesitation in extending a *Bivens* remedy, that is not this case. Plaintiffs here seek to employ a *Bivens* action to challenge an executive policy for the restrictive confinement of lawfully arrested illegal aliens while the FBI and CIA determined if they had any connection to recent terrorist attacks by aliens operating in this country or if they posed a threat of future attacks. This is hardly a familiar *Bivens* context, and such an intrusion on the executive's immigration authority counsels hesitation in denominating a judicially implied damages remedy against policymakers as the "best way" to implement constitutional guarantees in those circumstances. *Wilkie v. Robbins*, 551 U.S. at 550, 127 S. Ct. 2588.

3. *Implicating Executive's National Security Authority*

Plaintiffs' claims also propose to inquire into—and dispute—the executive's exercise of its national security authority. Indeed, that seems to be their primary purpose. This is an unprecedented *Bivens* context strongly counseling hesitation.

To explain, plaintiffs' due process and equal protection claims require proof of defendants' specific intent, either to punish, *see Bell v. Wolfish*, 441 U.S. at 538, 99 S. Ct. 1861, or to discriminate, *see Washington v. Davis*, 426 U.S. 229, 241-42, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). Such intent may be either express or implied. *See Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000). The majority here concludes that plaintiffs plausibly *im-*

ply proscribed intent through allegations that the challenged confinement policy was "not reasonably related to a legitimate goal." *See* Majority Op., *ante* at 244 (citing *Bell v. Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861). It similarly concludes that plaintiffs' plausibly plead that frequent strip searches were unreasonable relative to any legitimate penological interest. *See id.* at 260.

The "legitimate goal" at issue here is national security. MDC Plaintiffs propose to prove that their confinement in the ADMAX SHU was punitive and/or discriminatory by showing that there was no real national security need to maintain them in such restrictive confinement pending FBI–CIA clearance, at least not in the absence of prior individualized suspicion that each alien posed a terrorism threat. Plaintiffs propose to make essentially the same showing in challenging the reasonableness of the strip-search policy that accompanied restrictive confinement. Thus, the executive's exercise of national security authority, far from being irrelevant to plaintiffs' *Bivens* claims, *see* Majority Op., *ante* at 234, will be *the* critical focus of this litigation—and of the exhaustive discovery that will undoubtedly attend it.

The Supreme Court has never afforded a *Bivens* remedy to a party challenging the executive's exercise of its national security authority. *See Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) (making observation in declining to recognize *Bivens* action). Indeed, the Court has observed—in general and not simply with respect to *Bivens*—that "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention" in the absence of congressional authorization. *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981); *see Department of Navy v. Egan*,

484 U.S. 518, 529-30, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988) (stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); *accord Arar v. Ashcroft*, 585 F.3d at 578 (noting that intrusion on executive's national security authority raises "grave concerns about the separation of powers" dictated by the Constitution and, thus, counsels hesitation in extending *Bivens*).

Further counseling hesitation is the judiciary's limited competency to make national security assessments, *see Arar v. Ashcroft*, 585 F.3d at 575-78, particularly ones that could be informed by classified information, *see generally Boumediene v. Bush*, 553 U.S. 723, 797, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) (observing that federal judges do not "begin the day with briefings that may describe new and serious threats to our Nation and its people").[14] That competency concern is only heightened here by the extensive inquiry that will be necessary to understand and assess the risk concerns reasonably informing the challenged restrictive confinement policy. At a minimum, such an inquiry would have to consider the 9/11 attacks, the al Qaeda terrorist organization that ordered them, the attacks' alien perpetrators, and how those aliens—and, therefore, similarly minded others—could operate in the United States without detection.[15] It

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[14] *See also* Goldsmith, *The Terror Presidency* 71-74 (describing "threat matrix" provided daily to President and select officials, including Attorney General and FBI Director).

[15] *See, e.g.*, 9/11 Report 227-29 (reporting how, when 9/11 hijackers Mohamed Atta and Marwan al Shehhi encountered difficulty reentering United States in January 2001 without presenting student visas, they nevertheless persuaded INS inspectors to admit them so that they could continue flight training).

would have to consider the history of al Qaeda attacks on American interests *prior* to 9/11,[16] as well as terrorists' frequent use of immigration fraud to conceal their murderous plans.[17] It would have to consider past life-threatening actions by Islamic terrorists while in federal custody.[18] It would have to consider events *after* 9/11—during the time when the challenged confinement policy was maintained—that fueled fears of further attacks.[19]

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[16] Previous al Qaeda attacks included (1) the 1993 World Trade Center bombing (six deaths); (2) the thwarted 1993 conspiracy to bomb New York City landmarks led by the "Blind Sheikh," Omar Abdel Rahman; (3) the thwarted 1995 plot to explode American commercial airplanes over the Pacific Ocean, led by Ramzi Yousef; (4) the 1996 bombing of an apartment complex housing United States Air Force personnel in Khobar, Saudi Arabia (19 deaths); (5) the 1998 bombings of United States embassies in Tanzania and Kenya (224 deaths); (6) the thwarted millennial bombing of Los Angeles International Airport; and (7) the 2000 bombing of the U.S.S. Cole (17 deaths). *See United States v. Farhane*, 634 F.3d 127, 132 n.4 (2d Cir. 2011); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 103-05 (2d Cir. 2008).

[17] *See, e.g.*, 9/11 Report 177-78 (discussing how conspirators in Los Angeles Airport plot followed "a familiar terrorist pattern" of using "fraudulent passports and immigration fraud to travel" in furtherance of their scheme).

[18] *See, e.g., infra* at 292-93 (discussing prison actions of Omar Abdel Rahman and Mamdouh Mahmud Salim).

[19] Among these events were (1) the September 18, 2001 transmittal of anthrax in letters sent to various government and media offices, killing five, and infecting 17; (2) the mysterious November 12, 2001 crash of an American Airlines plane soon after takeoff from John F. Kennedy Airport, killing all onboard; (3) the thwarted December 22, 2001 attempt by Richard Reid to detonate a shoe bomb onboard an American Airlines plane traveling from Paris to Miami; and (4) the January 2002 kidnapping, and February 2002

Hesitation is also counseled by sober recognition that national security assessments, "particularly in times of conflict, do not admit easy answers, especially not as products of the necessarily limited analysis undertaken in a single case." *Lebron v. Rumsfeld*, 670 F.3d at 549. This contrasts sharply with "the small number of contexts in which courts have implied a *Bivens* remedy," where it generally has "been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued." *Arar v. Ashcroft*, 585 F.3d at 580.

Here, the majority proposes to draw a line between *generally* and *restrictively* confining illegal aliens until they are cleared of terrorist connections. It concludes that general confinement raises no constitutional concerns—even though the aliens so confined were mostly Arab and Muslim. But it concludes that restrictive confinement of such aliens (at least in the absence of individualized suspicion) goes too far reasonably to relate to national security. *See* Majority Op., *ante* at 247. Setting aside the question of judicial competency to make this national security assessment, the Supreme Court has specifically cautioned against extending *Bivens* to claims that propose to show that government officials "went too far" in pursuit of a legitimate objective. *Wilkie v. Rob-*

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beheading of *Wall Street Journal* reporter Daniel Pearl in Pakistan. Subsequent investigation would link the last two events to al Qaeda, with 9/11 mastermind Khalid Sheikh Mohammed claiming particular credit for the Pearl murder. *See* Peter Finn, *Khalid Sheik Mohammed killed U.S. Journalist Daniel Pearl, report finds*, Wash. Post, Jan. 20, 2011, http://wapo.st/NyvICX; Pam Belluck, *Threats and Responses: The Bomb Plot; Unrepentant Shoe Bomber Is Given a Life Sentence For Trying to Blow Up Jet*, N.Y. Times, Jan. 31, 2003, http://nyti.ms/ZhFZJF.

bins, 551 U.S. at 556-57, 127 S. Ct. 2588. That caution is particularly apt here where, before 9/11, the executive had never had to consider whether, and how restrictively, to confine illegal aliens in the aftermath of a surprise terrorist attack by aliens operating within this country. Much less had the courts ever confronted these questions. Precedent provided no easy answer—and certainly no easy negative answer—to whether it "reasonably related" to national security to hold lawfully arrested illegal aliens in restrictive confinement, at least until the FBI and CIA cleared them of terrorist connections. The law does not, after all, invariably demand individualized suspicion to support the restrictive confinement of lawfully arrested persons to ensure security, a point I discuss further *infra* at 290-91, and with which the majority agrees. *See Bell v. Wolfish*, 441 U.S. at 560-62, 99 S. Ct. 1861; *accord Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. at 1523; *Whitley v. Albers*, 475 U.S. 312, 316, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986); *Block v. Rutherford*, 468 U.S. 576, 577, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984); *see also* Majority Op., *ante* at 245-46 n.31.

Where plaintiffs' policy-challenging claims thus turn on a "reasonably related" inquiry implicating national security decisions made within "a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached," we not only confront a new *Bivens* context, but also one strongly counseling hesitation. *Arar v. Ashcroft*, 585 F.3d at 575, 580 (declining to extend *Bivens* to claim requiring "inquiry into the perceived need for the [challenged] policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the pro-

priety of adopting specific responses to particular threats").

Again, this does not mean that executive detention and confinement decisions implicating national security are insulated from judicial review. The Constitution's guarantee of habeas corpus ensures against that. *See Boumediene v. Bush*, 553 U.S. at 771, 128 S. Ct. 2229; *Hamdi v. Rumsfeld*, 542 U.S. 507, 525, 533, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); *see also Bell v. Wolfish*, 441 U.S. at 526, 99 S. Ct. 1861. But the fact that the Constitution expressly affords a liberty-safeguarding remedy against the sovereign even when national security concerns are present is hardly an invitation to the judiciary to imply a damages remedy against individual executive officials in these circumstances. *See Lebron v. Rumsfeld*, 670 F.3d at 550 (drawing distinction). Such a decision is more properly made by the legislative rather than the adjudicative branch of government.[20]

Thus, where, as here, plaintiffs urge this court to imply a damages action where none has been provided by Congress so that persons unlawfully in this country can challenge executive policy relating to national security in a time of crisis, a proper regard for separation of powers counsels hesitation in judicially extending *Bivens* to that

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[20] Were Congress to afford compensatory relief in the circumstances at issue, it is hardly obvious that it would place the burden on individual officials rather than the sovereign on whose behalf they acted. *See generally* John Paul Stevens, *Reflections About the Sovereign's Duty to Compensate Victims Harmed by Constitutional Violations, Lawyers for Civil Justice Membership Meeting* ("Stevens Reflections") 11 (May 4, 2015), *available at* http://1.usa.gov/1Ih51e4 (proposing that "sovereign, rather than its individual agents," compensate any persons whose rights were violated in course of 9/11 investigation).

new context. Indeed, I would decline to extend *Bivens* to plaintiffs' policy-challenging claims for this reason alone. There is, however, yet one further factor counseling hesitation.

4. *Congress's Failure To Provide a Damages Remedy*

The judiciary will not imply a *Bivens* action where Congress itself "has provided what it considers adequate remedial mechanisms for constitutional violations." *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988). Even where a congressionally prescribed remedy is lacking, however, courts will hesitate to extend *Bivens* to a new context where there is reason to think Congress's inaction is not "inadvertent." *Id.*; *accord Dotson v. Griesa*, 398 F.3d 156, 167 (2d Cir. 2005). That conclusion is warranted here, where Congress has not provided a damages remedy to post-9/11 detainees despite its awareness that (1) DOJ was arresting and detaining illegal aliens as part of its response to 9/11, (2) DOJ might press hard against constitutional bounds in its efforts to safeguard national security, and (3) concerns had arisen pertaining to the detention of Arab and Muslim aliens.

As to the first point, Attorney General Ashcroft and FBI Director Mueller (as well as other DOJ officials) repeatedly testified before Congress that the arrest of illegal aliens was part of DOJ's post-9/11 strategy against terrorism.[21]

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[21] *See, e.g., Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. On the Judiciary*, 107th Cong. 312 (Dec. 6, 2001) (statement of John Ashcroft, Att'y Gen. of the United States) (explaining "deliberate campaign of arrest and detention to remove suspected ter-

As to the second point, when Congress enacted the PATRIOT Act in October 2001, it anticipated possible DOJ overreaching and required the Department's Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism.[22] Indeed, it is pursuant to this legislative mandate that the Inspector General provided Congress with the very OIG Reports upon which plaintiffs rely in pleading their complaint.

As to the third point, these OIG Reports discussed concerns about the treatment of confined Arab and Muslim aliens, and Congress's attention to these concerns is evident in the public record.[23] Despite its awareness of these matters, however, neither in enacting the PATRIOT Act, nor in the more than thirteen years that have now followed—during which time portions of the PATRIOT Act were re-authorized five times[24]—has Congress af-

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rorists who violate the law from our streets," noting that "INS has detained 563 individuals on immigration violations" and that BOP had "acted swiftly to intensify security precautions in connection with al Qaeda and other terrorist inmates," and adding that DOJ "has briefed members of the House, the Senate and their staffs on more than 100 occasions").

[22] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001).

[23] *See, e.g., Oversight Hearing: Law Enforcement and Terrorism: Hearing Before the S. Comm. on the Judiciary,* 108th Cong. 192 (July 23, 2003) (questioning by Sen. Patrick Leahy of FBI Director Mueller about OIG report "alleging, among other things, the abuse of immigrants being held in Federal custody," particularly "Muslim and Arab immigrants being held on civil violations of our immigration laws").

[24] *See* Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015

forded a damages remedy to aliens who were, or in the future could be, detained in connection with terrorism investigations. We must presume that Congress was aware that alternative, albeit non-compensatory, remedies were available to challenge unconstitutional confinement, notably, habeas corpus and the "remedial mechanisms established by the BOP, including suits in federal court for injunctive relief." *Correctional Servs. Corp. v. Malesko*, 534 U.S. at 74, 122 S. Ct. 515 (observing that injunctive relief has long been recognized as proper means for altering unconstitutional policy); *see Bell v. Wolfish*, 441 U.S. at 526, 99 S. Ct. 1861 (habeas corpus review).[25] Where Congress, with awareness of the con-

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("USA FREEDOM Act"), Pub. L. No. 114-23, 129 Stat. 268 (2015); PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011); Act to Extend Expiring Provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Intelligence Reform and Terrorism Prevention Act of 2004 until February 28, 2011, Pub. L. No. 111-141, 124 Stat. 37 (2010); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2005).

[25] MDC Plaintiff Baloch was among the illegal aliens arrested in the 9/11 investigation who filed a habeas petition to challenge his confinement. *See Turkmen v. Ashcroft*, No. 02 CV 2307(JG), 2006 WL 1662663, at *5 (E.D.N.Y. June 14, 2006) ("*Turkmen I*") (stating that Baloch filed habeas petition and six weeks later was transferred from ADMAX SHU to general population), *aff'd in part, vacated in part*, 589 F.3d 542 (2d Cir. 2009) ("*Turkmen II*"); *see also* OIG Report 87, 99-100, 102 (reporting other detainees' filing of habeas petitions).

The Ninth Circuit has cited the availability of a habeas remedy (and plaintiffs' pursuit of such relief) as a factor counseling hesitation in extending *Bivens* to claims of unlawful detention. *See Mirmehdi v. United States*, 689 F.3d at 982.

cerns at issue, as well as the remedies available to address them, legislates repeatedly in an area without affording a damages remedy, there is strong reason to think that its inaction was not inadvertent and, thus, for the judiciary to hesitate before extending *Bivens* to that area. *See Klay v. Panetta*, 758 F.3d 369, 376 (D.C. Cir. 2014) ("If Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under *Bivens*, respect for the separation of powers demands that courts hesitate to imply a remedy."); *Lebron v. Rumsfeld*, 670 F.3d at 551-52 (observing that where "Congress was no idle bystander" and had "devoted extensive attention" to the concerns at issue in case but nonetheless did not create damages remedy, court could infer that "congressional inaction ha[d] not been inadvertent"); *cf. Arar v. Ashcroft*, 585 F.3d at 573 (stating that "complexity" of remedial immigration scheme created (and frequently amended) by Congress would ordinarily warrant "strong inference that Congress intended the judiciary to stay its hand and refrain from creating a *Bivens* action in this context").

Accordingly, insofar as plaintiffs invoke *Bivens* to challenge an official executive policy for the restrictive confinement and strip searching of illegal aliens in the aftermath of the 9/11 attacks, I conclude that their claims must be dismissed because a *Bivens* remedy has not been extended to such a context, and factors strongly counsel against this court doing so here. If illegal aliens should be afforded a damages remedy to challenge an executive policy implicating immigration and national security authority, that decision should be made by Congress rather than by the courts. *See Arar v. Ashcroft*, 585 F.3d at 580-81 ("Congress is the appropriate branch" to decide whether policy decisions "directly related to the security

of the population and the foreign affairs of the country" should be "subjected to the influence of litigation brought by aliens").

II. *Defendants Are Entitled to Qualified Immunity*

A. *The Concept of Qualified Immunity*

Whether or not a *Bivens* action is available to challenge the executive policy at issue, defendants are entitled to dismissal on grounds of qualified immunity. Qualified immunity—a concept derived from common law—shields federal and state officials from claims for money damages "unless a plaintiff pleads facts showing that (1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). For law to be clearly established, it is not necessary to identify a case directly on point. But precedent must have spoken with sufficient clarity to have placed the constitutional question "beyond debate." *Id.* at 2083; *accord Carroll v. Carman*, — U.S. —, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311 (2014). Put another way, the law must have made "the contours" of the asserted right "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 131 S. Ct. at 2083 (internal quotation marks omitted).

Qualified immunity affords such a broad shield to protect not simply government officials but government itself, specifically, "government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). Thus, qualified im-

munity is afforded to ensure both that talented persons are not deterred from entering public service by the threat of crippling damages suits, *see id.*, and that those in government service act "with the decisiveness and the judgment required by the public good," *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *accord Filarsky v. Delia*, — U.S. —, 132 S. Ct. 1657, 1665, 182 L. Ed. 2d 662 (2012); *Richardson v. McKnight*, 521 U.S. 399, 409, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997) (describing "unwarranted timidity" on the part of those engaged in public's business as "most important special government immunity-producing concern"); *Amore v. Novarro*, 624 F.3d 522, 530 (2d Cir. 2010) (recognizing that qualified immunity is animated by "concern that for the public benefit, public officials be able to perform their duties unflinchingly and without constant dread of retaliation").

Toward this end, qualified immunity serves to give public officials "breathing room to make reasonable but mistaken judgments" without fear of disabling liability. *Messerschmidt v. Millender*, — U.S. —, 132 S. Ct. 1235, 1244, 182 L. Ed. 2d 47 (2012) (internal quotation marks omitted). Indeed, the standard is sufficiently forgiving that it protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).[26]

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[26] The Supreme Court's recent repeated unanimous awards of qualified immunity emphasize the narrow circumstances in which government officials may be held personally liable for their actions in suits for money damages. *See, e.g., Taylor v. Barkes*, — U.S. —, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78 (2015); *Carroll v. Carman*, 135 S. Ct. at 350-52; *Lane v. Franks*, — U.S. —, 134 S. Ct.

It is difficult to imagine a public good more demanding of decisiveness or more tolerant of reasonable, even if mistaken, judgments than the protection of this nation and its people from further terrorist attacks in the immediate aftermath of the horrific events of 9/11.[27] Whatever lessons hindsight might teach about how best to achieve this legitimate government objective within our system of laws, I cannot conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy. Insofar as the majority decides otherwise based on its determinations that plaintiffs have (1) plausibly pleaded violations of Fourth and Fifth Amendment rights, (2) which rights were clearly established at the time of defendants' actions, I respectfully dissent. As to the second point in particular, I think the majority defines established law at an impermissibly "high level of generality." *Id.* at 2084.

B. *Punitive Confinement*

The MDC Plaintiffs having been lawfully arrested for, but not yet convicted of, violations of federal immigration law, their confinement status was that of pretrial detainees. The Fifth Amendment guarantee of substantive due

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2369, 2383, 189 L. Ed. 2d 312 (2014); *Wood v. Moss*, — U.S. —, 134 S. Ct. 2056, 2070, 188 L. Ed. 2d 1039 (2014); *Plumhoff v. Rickard*, — U.S. —, 134 S. Ct. 2012, 2023-24, 188 L. Ed. 2d 1056 (2014); *Stanton v. Sims*, — U.S. —, 134 S. Ct. 3, 7, 187 L. Ed. 2d 341 (2013).

[27] *See generally* Stevens Reflections 9 (advocating *absolute* immunity for "dedicated public officials"—including Ashcroft and Mueller—who, in aftermath of 9/11, were "attempting to minimize the risk of another terrorist attack," while proposing that federal government assume responsibility for compensating any persons whose rights were violated).

process does not permit pre-trial detainees to be subjected to confinement, or to restrictive conditions of confinement, "for the purpose of punishment." *Bell v. Wolfish*, 441 U.S. at 538, 99 S. Ct. 1861. At the same time, due process does not preclude restrictive confinement "incident of some other legitimate government purpose." *Id.* In short, pre-trial confinement, or a condition of pre-trial confinement is not deemed "punishment" in the abstract, but only by virtue of the purpose for which it is imposed.

To maintain a punitive confinement claim, then, a pre-trial detainee must plausibly plead that a defendant imposed restrictive confinement with the specific intent to punish. *See id.* Where, as here, plaintiffs propose for such intent to be implied, they must plead facts sufficient to admit a plausible inference that the challenged conditions of their confinement were "not reasonably related to a legitimate goal" but, rather, were "arbitrary or purposeless." *Id.* at 539, 99 S. Ct. 1861. The burden is significant because a reasonable relatedness inquiry is not an end in itself. Rather, it is a proxy for determining a defendant's true intent. Thus, a plaintiff does not plausibly plead punitive intent simply by alleging *some* mismatch between challenged conditions of confinement and the legitimate goal they are intended to serve. *See, e.g., id.* at 558-60, 99 S. Ct. 1861 (rejecting challenge to routine body cavity searches of pre-trial detainees following contact visits even though there had been only one reported attempt to smuggle contraband into facility in body cavity); *accord Block v. Rutherford*, 468 U.S. at 587, 104 S. Ct. 3227 (rejecting lower courts' characterization of total ban on contact visits as excessive in relation to security and other interests at stake). The mismatch must be so glaring as to make the challenged condition "arbitrary or

purposeless" relative to any legitimate goal. Moreover, when the professed legitimate goal is security, the plausibility of any arbitrary or purposeless assertion must be considered in light of the "wide-ranging deference" that the law accords prison administrators in determining the conditions necessary to preserve discipline and security. *Bell v. Wolfish*, 441 U.S. at 547, 99 S. Ct. 1861 (cautioning that courts must not depend on their own "idea of how best to operate a detention facility"); *accord Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. at 1517; *Trammell v. Keane*, 338 F.3d 155, 163 (2d Cir. 2003).

Further, as the Supreme Court recently explained in rejecting an earlier discriminatory confinement challenge to the very policy here at issue, plaintiffs cannot carry their pleading burden by alleging facts that admit only a "possibility" of defendants' proscribed intent. *Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. "[F]acts that are merely consistent with a defendant's liability . . . stop[ ] short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted). This is particularly so where "more likely" legitimate explanations for defendants' actions are "obvious." *Id.* at 681-82, 129 S. Ct. 1937.

1. *DOJ Defendants*

The panel majority concludes—and I agree—that plaintiffs fail plausibly to plead that the DOJ hold-until-cleared policy, as applied *ab initio* to illegal aliens arrested in the course of the FBI's 9/11 investigation, implies the DOJ Defendants' punitive intent. The "obvious" and "more likely explanation[ ]" for the policy was the government's legitimate interest in national security, specifically, in identifying and apprehending any persons connected with the 9/11 terrorist attacks and in detecting

and preventing future attacks. *Id.* In pursuing those goals, the DOJ Defendants were entitled to assume that subordinates would lawfully implement the hold-until-cleared policy. *See* Majority Op., *ante* at 238; *see also Turkmen v. Ashcroft*, 915 F. Supp. 2d 314, 340 (E.D.N.Y. 2013) ("*Turkmen III*").

Where I depart from the majority is in its determination that plaintiffs plausibly plead that the DOJ Defendants' legitimate national security purpose transformed to proscribed punitive intent by November 2001, when they approved merger of the FBI New York detainee list with the INS national detainee list, thereby maintaining the MDC Plaintiffs in the ADMAX SHU pending FBI–CIA clearance without individualized suspicion of these aliens' connection to terrorism. *See* Majority Op., *ante* at 238-39, 246. Much less can I agree that clearly established law alerted every reasonable official that such actions violated substantive due process.[28]

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[28] Plaintiffs themselves *never* raised this lists-merger theory, either in their briefs to this court or in the district court. The majority, however, views merger of the New York and national lists as the critical event because it construes the pleadings to allege that "illegal aliens were being detained in punitive conditions of confinement in New York" with "no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be Arab or Muslim." Majority Op., *ante* at 237-38. This is not apparent in the record.

For example, when MDC Plaintiff Purna Raj Bajracharya was placed in restrictive confinement, federal officials knew that, approximately two weeks before the 9/11 attacks, he had been observed videotaping a Queens building that housed both a New York FBI unit and the Queens County District Attorney's Office. *See id.* at 230. They further knew that when Bajracharya—who had lived illegally in the United States for five years—was questioned

First, insofar as the November 2001 lists-merger decision is the critical factor in the majority's identification of a plausible punitive confinement claim, plaintiffs fail to plead a sufficient factual basis for ascribing the merger

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about this conduct, he falsely claimed to be a tourist. While these circumstances did not conclusively link Bajracharya to terrorism, no more so did Zacarias Moussaoui's pre-9/11 interest in flight simulator training for large jets. What both circumstances did provide, however, was individualized suspicion for investigating these mens' ties to terrorism, which in Moussaoui's case led to his conviction for participation in the 9/11 conspiracy. *See United States v. Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010).

Further, New York list detainees were *not* uniformly detained in "punitive" conditions—by which I understand the majority to be referring to highly restrictive conditions of confinement rather than to the intent with which such restrictions were imposed. Much less were they so confined for no reason other than ethnicity or religion. This is evident from the fact that the vast majority of the approximately 300 persons on the New York list at the time of the merger decision were Arab or Muslim. Nevertheless, no more than 84 detainees were ever restrictively confined in the ADMAX SHU. *See* OIG Report 2, 22, 111. The remainder were held in general confinement at the Passaic County Jail. The designation difference appears generally to have been based on whether an arrested illegal alien was designated "high interest," "of interest," or "interest undetermined" to the 9/11 investigation. *See* OIG Report 18, 111 (explaining that arrested illegal aliens in first category were generally held in high security confinement at MDC, while persons in latter two categories were generally held in less restrictive confinement at Passaic County Jail). Nevertheless, because the OIG Report provides no specifics on this point, and because plaintiffs allege that some of them were detained at the MDC "even though they had not been classified 'high interest,'" Fourth Am. Compl. ¶ 4. I do not pursue the matter further. Rather, I proceed to explain why plaintiffs fail, even under the majority's lists-merger theory, plausibly to plead a claim for punitive (or discriminatory) confinement, much less one supported by clearly established law.

decision to any of the three DOJ Defendants. *See Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. Their allegations—that Attorney General Ashcroft "ordered that" New York list detainees "be detained until cleared and otherwise treated as 'of interest,'" and that FBI Director Mueller and INS Commissioner Ziglar "were fully informed of this decision, and complied with it," Fourth Am. Compl. ("Compl.") ¶ 47—are plainly not based on personal knowledge and, in fact, are belied by the very OIG Report on which they rely to support their claims, *see id.* ¶ 3 n.1. That report states quite clearly that it was Associate Deputy Attorney General Stuart Levey who, at the end of the November 2, 2001 meeting with FBI and INS representatives, "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." OIG Report 56. To be sure, plaintiffs profess to incorporate the OIG Report into their pleadings only to the extent it is not "contradicted" by their own allegations. Compl. ¶ 3 n.1. But that begs the question of whether there is sufficient factual matter—either in plaintiffs' allegations or in the OIG Report—plausibly to ascribe merger responsibility to any of the DOJ Defendants. There is not. Nothing in the OIG Report indicates that Levey's merger decision was ever ordered or endorsed by Attorney General Ashcroft, FBI Director Mueller, or INS Commissioner Ziglar, or even communicated to them.

In concluding otherwise, the majority asserts that OIG identification of Levey as the lists-merger decisionmaker does not absolve Ashcroft of responsibility because the OIG appears not to have asked Ashcroft about his role in that decision. *See* Majority Op., *ante* at 242. To the extent this implies OIG negligence or oversight, that hardly supplies a factual basis for inferring Ashcroft's re-

sponsibility. *See Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. In any event, negligence is belied by the OIG's detailed 198-page, singlespaced report, which includes a careful discussion of when, how, and by whom the merger decision was made. *See* OIG Report 55-57; *see also* Compl. ¶ 3 n.1 (describing "well-documented" OIG Report).[29]

Nor can the majority infer Ashcroft's responsibility simply by referencing "the importance of the merger and its implications for how [Ashcroft's] lawful original [hold-until-cleared] order was being carried out." Majority Op., *ante* at 242. Not only is the assertion conclusory, but also *Ashcroft v. Iqbal* holds that even facts "merely consistent with a defendant's liability . . . stop[] short of the line between possibility and plausibility." 556 U.S. at 681-82, 129 S. Ct. 1937 (internal quotation marks omitted).

Insofar as the majority maintains that the OIG Report itself provides factual support for a plausible inference that Ashcroft, not Levey, was the ultimate merger decisionmaker, the conclusion does not bear close examination. For example, the majority highlights part of the OIG Report indicating that, at the same November 2 meeting where the lists-merger question arose, an INS

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[29] The majority responds that I mistakenly treat "the OIG reports as a repository of all . . . facts" relevant to plaintiffs' claims, "measur[ing] plausibility by the absence or presence of fact-findings" in these reports. *See* Majority Op., *ante* at 242. Not so. It is plaintiffs who support their pleadings by incorporating the OIG Reports. And it is the majority that maintains that statements in (or in the instant example, an omission from) the OIG Report, reasonably establish the plausibility of plaintiffs' claims. I herein demonstrate only why no "factual matter" supports such a conclusion. *Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937.

official questioned the need for CIA (as well as FBI) checks prior to releasing 9/11 detainees, prompting Levey to reply that he would need to check to see if "'any detainees could be released without the CIA check.'" Majority Op., *ante* at 242 (quoting OIG Report 56). The majority reasons that if this statement is construed to suggest Levey's "lack of authority" to make a decision as to CIA checks, it plausibly "supports the conclusion that Levey . . . had to take [the question] to more senior officials." *Id.* at 242. The majority then quotes another part of the OIG Report indicating that, in late November, when the INS Chief of Staff asked if DOJ would reconsider the CIA check requirement, Levey was still concerned about "'chang[ing] the CIA check policy without additional input.'" *Id.* at 243 (quoting OIG Report 62). It concludes that "if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance" and, therefore, it is plausible to think that he brought the question to Ashcroft. *Id.*

This reasoning is wholly speculative in assuming Levey's equal discomfort with the CIA check and merger decisions. Moreover, the majority's inference that Ashcroft was the consulted "senior official" is defeated by the very OIG Report on which it purports to rely. That report specifically identifies the person Levey consulted about continuing CIA checks: it was *not* Attorney General Ashcroft, but "David Laufman, the Deputy Attorney General's Chief of Staff." OIG Report 62. It was Laufman who advised Levey to continue the CIA checks.

See id.[30] In its footnote acknowledgment of Laufman's role, the majority denies any intent to imply Ashcroft's responsibility for the CIA checks decision. It maintains that "the only relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list merger decision on his own." Majority Op., *ante* at 243 n.27. What the majority fails to explain, however, is how *that* analogy supports an inference that *Ashcroft* made the merger decision.

While that could end this discussion, I further note that the OIG Report does not, in fact, permit one to infer from Levey's discomfort with canceling CIA checks on his own that he must have been equally uncomfortable with making the lists-merger decision. The OIG Report expressly states that Levey made the lists-merger decision "[a]t the conclusion of the [November 2] meeting" at which the subject was first raised to him. OIG Report 56. In short, there was no delay in Levey's making of the merger decision for him to consult with Ashcroft or anyone else, leaving the majority's reasoning on this point wholly without any basis in fact.

The majority responds that because "the issue of the New York list was discovered in October 2001, . . . surely it is plausible that Levey consulted with more senior officials, including Ashcroft, *prior to* [the November 2] meeting." Majority Op., *ante* at 243-44 (emphasis in original). Even if this were an accurate account of

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[30] The majority can hardly have overlooked the OIG's identification of Laufman because it occurs in the very sentence of the Report that the majority quotes (in part) about Levey's continuing discomfort with making a CIA check decision in late November 2001. *See* OIG Report 62.

events, it admits no more than a *possibility* that Levey consulted with anyone in the interim, much less that the person consulted was Ashcroft. But I do not think this account is accurate. While the OIG Report does detail an October 22, 2001 meeting at which DOJ, FBI, and INS representatives discussed "problems presented by the New York List," the critical fact omitted by the majority is that Levey was *not* in attendance. OIG Report 55. The OIG Report states that what Levey attended was a "follow-up meeting" on November 2, 2001. It was there that he heard the competing views of the three interested entities, and made the merger decision. *Id.* at 55-56. The majority nevertheless deems it plausible that Levey learned about the October New York list discussion in advance of the November meeting because "Levey would not attend the November 2 meeting without knowing its agenda." Majority Op., *ante* at 243 n.29. This gave him "time to consult with more senior officials, *including Ashcroft*, before communicating a decision" at the November 2 meeting. *Id.* (emphasis added). Such attenuated reasoning stops well "short of the line between possibility and plausibility." *Ashcroft v. Iqbal*, 556 U.S. at 681-82, 129 S. Ct. 1937 (internal quotation marks omitted). It is pure speculation.[31]

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[31] In another footnote, the majority further asserts that *Levey's* communication with Ashcroft about the lists-merger decision, and Ashcroft's approval of the merger, find support in Ziglar's statement to the OIG that "he [*i.e.*, Ziglar] contacted the Attorney General's Office on November 7, 2001 [*i.e.*, five days after Levey had already made the merger decision], to discuss concerns about the clearance process, especially the impact of adding the New York cases to the INS Custody list." OIG Report 66. But the OIG Report makes clear that who Ziglar called was not Ashcroft himself, but his Chief of Staff, and that the person he in fact spoke with

Thus, the pleadings, even with incorporation of the OIG Report, do not "contain sufficient factual matter" plausibly to ascribe the lists-merger decision to the DOJ Defendants *Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937 (stating that well-pleaded facts must permit court to infer more than mere possibility of misconduct).

Second, even if plaintiffs could plausibly allege the DOJ Defendants' responsibility for the merger decision—which they cannot—plaintiffs fail to plead that these defendants thereby intended for plaintiffs to be held in the MDC's ADMAX SHU. The Complaint pleadings quoted at the start of the preceding point, *see supra* at 239-40, assert only that New York list detainees should be designated as "of interest" and held until cleared; they make no mention of any DOJ Defendant dictating aliens' continued confinement in the ADMAX SHU, or even their awareness of that result. Indeed, after merger, most New York list detainees continued to be held in general confinement at the Passaic County Jail. *See* OIG Report 111.

Moreover, the OIG Report's detailed discussion of the lists-merger decision gives no indication that the issue of continued restrictive—as opposed to general—confinement informed the merger decision in any way. The Report explains that INS officials opposed merger because of "how it would look when [INS] statistics re-

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was Deputy Chief of Staff David Israelite. *Id.* at 66-67. Further, when Ziglar's quoted statement is read in the context of preceding and subsequent paragraphs, it is plain that his concerns related only to the "slow pace" of the FBI's clearance process, not to the conditions of confinement for New York list detainees held at the MDC. *Id.* These facts cannot admit a plausible inference that Ashcroft made the merger decision, much less that he made it for a punitive purpose.

garding the number of September 11 detainees doubled overnight." OIG Report 55. The INS feared these high numbers would persist because of the time it was taking the FBI New York office to conduct clearance inquiries. The INS predicted that such delay would make it difficult for its attorneys to argue for continued detention without bail. *See id.* at 55-56.[32] Viewed in this context, the statement of Victor Cerda, Ziglar's Chief of Staff, explaining INS's opposition to the merger decision—"INS did not want to begin treating all the detainees on the New York list under the more restrictive INS policies applicable to September 11 detainees," OIG Report 56—can only be understood to reference the INS policy of holding *all* 9/11 detainees without bond, a restriction that it did not apply to illegal aliens generally, *see id.* at 73. In sum, the merger debate between the INS and FBI was about whether illegal aliens on the New York list should continue to be detained at all, not about the conditions of their confinement. Thus, the debate admits no inference that the merger decision—by whomever made—was motivated by a desire to subject the MDC Plaintiffs to restrictive confinement.

Third, as the district court observed in dismissing plaintiffs' punitive confinement claim against the DOJ Defendants, plaintiffs do not allege that these defendants

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[32] At the same time that the OIG Report criticized the slow pace of FBI clearance, it acknowledged that the FBI New York office was under enormous pressure after the 9/11 attacks, both in investigating that event and in preventing future attacks. The New York office had by far the most leads to pursue, in the course of which it encountered the most illegal aliens. *See* OIG Report 2, 22 (indicating that, of the 762 illegal aliens arrested during the 9/11 investigation nationwide through August 6, 2002, 491 were arrested in New York).

"were even aware" of the challenged restrictive confinement conditions at the MDC. *Turkmen III*, 915 F. Supp. 2d at 340. The majority nevertheless concludes that the Complaint admits an inference of such awareness, pointing to allegations that (1) FBI Director Mueller oversaw the 9/11 investigation from FBI Headquarters, *see* Compl. ¶¶ 56-57; and (2) the DOJ Defendants "received detailed daily reports of the arrests and detentions," *id.* ¶ 47. *See* Majority Op., *ante* at 254. I respectfully submit that these allegations admit no more than a possibility that the DOJ Defendants ever learned of the particular conditions of confinement imposed by BOP officials at the MDC—or, indeed, at any of the other facilities around the country where the 738 illegal aliens arrested in the course of the 9/11 investigation were held until cleared.

The first allegation, that FBI Director Mueller oversaw the vast 9/11 investigation from headquarters—as opposed to the investigation being run out of one or more field offices—says nothing to support an inference that Mueller would therefore have had personal knowledge as to the particular confinement conditions imposed by the BOP on MDC detainees. *See Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937 (holding that complaint must do more than plead facts "merely consistent with a defendant's liability" to cross the line from "possibility" to "plausibility"). To be sure, plaintiffs allege that the MDC defendants formulated the challenged restrictive conditions "in consultation with the FBI." Compl. ¶ 65. But the FBI is an organization with more than 13,000 agents among 30,000 employees. Thus, this pleading hardly admits an inference that the FBI Director himself (much less the Attorney General or INS Commissioner) personally participated in or even knew of these consultations.

As to the second allegation highlighted by the majority, even assuming *arguendo* that it might admit an inference that the DOJ Defendants received daily reports on the number of illegal aliens detained in the 9/11 investigation, and on facts about such persons relevant to the ongoing terrorism investigation, it is pure conjecture to think that daily reports to federal authorities at this high level detailed the particular conditions of confinement under which each arrested alien was being held at the various facilities being used for that purpose. *See id.* Indeed, as the district court observed, plaintiffs themselves allege that the challenged conditions of confinement at the MDC were the "result" of the DOJ Defendants' policy of holding illegal aliens until cleared, rather than a specifically approved element of that policy. *Turkmen III*, 915 F. Supp. 2d at 340 (citing Compl. ¶ 61).

Nor do those parts of the OIG Report cited by the majority support a different conclusion. *See* Majority Op., *ante* at 239-40. A BOP official's statement that "*the Department* [of Justice] was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities," OIG Report 19 (emphasis added), is too vague to ascribe personal awareness to the three DOJ Defendants in this case.[33] Moreover, the

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[33] Indeed, the OIG Report indicates that a number of DOJ witnesses—including Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division; his Deputy Alice Fisher, who oversaw terrorism issues in the division; David Israelite, the Deputy Chief of Staff to the Attorney General; and Southern District of New York Deputy U.S. Attorney David Kelley, the lead prosecutor on the 9/11 investigation—stated that they either had "no information" or "no input" into where detainees would be held or the conditions of their confinement at the various BOP facilities. *Id.* at 20.

statement references how the BOP generally implemented the hold-under-clear policy throughout the country—which the panel concludes does not support plausible constitutional claims against these defendants. It does not reference the particular MDC restrictive confinement here at issue.

Insofar as the Attorney General's Deputy Chief of Staff recalled "one allegation of prisoner mistreatment being called to the attention of the Attorney General," *id.* at 20, a single complaint suggests rogue abuse, not the restrictive confinement *policy* at issue here. Further, the Attorney General's response was not to approve such conduct, but to call for a staff inquiry, hardly action implying punitive intent. *See id.*

BOP Director Kathy Hawk Sawyer did tell the OIG of conversations she had in the weeks following 9/11 with the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, in which these men expressed "concerns about detainees ability to communicate both with those outside the facility and with other inmates," and urged the BOP to take "policies to their legal limit" to prevent such communication in order "to give officials investigating the detainees time to 'do their job.'" *Id.* at 112-13. But statements by members of the *Deputy Attorney General's* staff admit no more than a "possibility" that the *Attorney General* himself was aware of their content. *Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. That conclusion applies with even more force to the FBI Director or INS Commissioner. Moreover, the Laufman-Wray communications appear to have urged a communication blackout for all 9/11 detainees, not just those held at the MDC. *See* OIG Report 113. Thus,

they cannot support an inference that the DOJ Defendants knew the particular restrictive conditions imposed in that facility. Further, it appears that the BOP lifted the communications blackout on 9/11 detainees—even at the MDC—by mid-October 2001, *see id.* at 114, which is before the November merger decision that is the majority's triggering date for a plausible claim of punitive and discriminatory confinement by MDC Plaintiffs. Thus, communications before the November merger, by persons other than the DOJ Defendants, about a condition of confinement that BOP lifted before the merger decision was made, support no inference as to what the DOJ Defendants knew about conditions of confinement at the MDC in November 2001.[34]

Fourth, even if plaintiffs' allegations were sufficient to admit an inference that the DOJ Defendants knew that, as a consequence of the lists' merger, MDC Plaintiffs would remain in restrictive confinement, that would be insufficient to imply the requisite specific intent. As the Supreme Court explained in *Ashcroft v. Iqbal*, "purposeful" conduct "requires more than intent as volition or intent as awareness of consequences." 556 U.S. at 681, 129 S. Ct. 1937. It requires that a decisionmaker undertake a course of action "'because of,' not merely 'in spite of' the action's adverse effects." *Id.* (internal quotation marks and citation omitted). Here, the pleadings provide no factual basis to conclude that anyone

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[34] For the same reasons that I think pleadings related to the lists-merger decision do not admit a plausible inference that the DOJ Defendants knew of the particular restrictive conditions of confinement at the MDC, I do not think they admit a plausible inference that the DOJ Defendants knew that such conditions were being imposed without individualized suspicion of terrorist connections.

made the merger decision *because* it would keep the MDC Plaintiffs in restrictive confinement.

Fifth, plaintiffs fail in any event plausibly to allege facts admitting an inference that their continued MDC restrictive confinement after November 2001 was "arbitrary or purposeless" to any legitimate objective, so that plaintiffs' real intent must have been punitive. *Bell v. Wolfish*, 441 U.S. at 539, 99 S. Ct. 1861. That inference is, I submit, foreclosed by the "obvious" and "more likely" explanation for the challenged action: the DOJ Defendants' determination to identify and apprehend anyone involved in the 9/11 attacks and to safeguard the nation from further terrorist attacks. *Ashcroft v. Iqbal*, 556 U.S. at 681-82, 129 S. Ct. 1937.

This non-punitive motivation is no after-the-fact invention. The Supreme Court recognized it to motivate the entire vast investigation that followed 9/11 and pursuant to which plaintiffs were arrested and confined. *See id.* at 667, 129 S. Ct. 1937 (stating that "FBI and other entities within the Department of Justice began an investigation of vast reach to identify the [9/11] assailants and prevent them from attacking anew," dedicating "more than 4,000 special agents and 3,000 support personnel to the endeavor"). The OIG Report makes the same point. *See* OIG Report 12-13 (noting Attorney General's directive that all components of DOJ "focus their efforts on disrupting any additional terrorist threats," and general understanding within DOJ that every available legal means should be used "to make sure that no one else was killed").

The panel majority acknowledges that national security concerns "might well" have motivated defendants' challenged actions, *see* Majority Op., *ante* at 264, includ-

ing the merger decision on which it relies to deny dismissal to the DOJ Defendants, *see id.* at 244 (quoting Levey's statement to OIG that, in merging lists, "he wanted to err on the side of caution so that a terrorist would not be released by mistake," OIG Report 56). Indeed, the OIG Report specifically concludes that the merger decision "was supportable, given the desire not to release any alien who might be connected to the [9/11] attacks or [to] terrorism." OIG Report 71. Nevertheless, the majority maintains that, even if the DOJ Defendants were intent on ensuring national security, the mismatch between that object and the restrictive confinement conditions at the MDC was so great (in the absence of individualized suspicion) as to be deemed arbitrary and purposeless, admitting an inference of punitive intent. *See* Majority Op., *ante* at 244-45.

Whether a court, upon identifying an obvious non-punitive intent for challenged conduct, can nevertheless allow plaintiffs to pursue a substantive due process claim on a theory of implied punitive intent is not apparent. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. at 683, 129 S. Ct. 1937 (rejecting discrimination claim in such circumstances); *Block v. Rutherford*, 468 U.S. at 589, 104 S. Ct. 3227 (instructing that once court identifies legitimate purpose for challenged confinement policy, its inquiry should end because "further 'balancing' result[s] in an impermissible substitution of [the court's] views" for those of confining authorities). Certainly, the conclusion is not placed "beyond debate" by clearly established law, without which defendants must be afforded qualified immunity. *Carroll v. Carman*, 135 S. Ct. at 350; *Ashcroft v. al-Kidd*, 131 S. Ct. at 2083.

In urging otherwise, the majority cites *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447, and *Iqbal v. Hasty*, 490 F.3d 143. *See* Majority Op., *ante* at 246. *Bell v. Wolfish* held that if a condition of pre-trial confinement "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment." 441 U.S. at 539, 99 S. Ct. 1861. But that simply states a "general proposition," which affords "little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft v. al-Kidd*, 131 S. Ct. at 2084. Moreover, because *Wolfish* itself rejected all constitutional challenges to the restrictive conditions there at issue, *see* 441 U.S. at 560-62, 99 S. Ct. 1861, it hardly made the parameters of the substantive due process ban on punitive pretrial confinement "sufficiently clear that every reasonable official would have understood" that the restrictive conditions here at issue were arbitrary or purposeless to ensuring national security in the absence of individualized suspicion of terrorism, *Ashcroft v. al-Kidd*, 131 S. Ct. at 2083 (holding that unless law is so clearly established, official is entitled to qualified immunity).

As for *Iqbal v. Hasty*, this court did not there place beyond dispute the need for individualized suspicion of terrorism to place 9/11 detainees in restrictive confinement. Indeed, that case made no mention of the lack of such suspicion in observing that "[t]he right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a detainee by subjecting him to the practices and conditions alleged by the Plaintiff." *Iqbal v. Hasty*, 490 F.3d at 169. In fact, this statement was made in con-

cluding that plaintiffs had adequately alleged Warden Hasty's express punitive intent. That conclusion having been reached under a pleading standard abrogated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. at 680, 129 S. Ct. 1937, *Hasty's* preclusive effect here is open to question. But even if we assume that this court there correctly concluded that the prohibition on punitive restraints is clearly established in any circumstance where a defendant acts with the *express* intent to punish, *Hasty* did not hold that the same conclusion applies in the myriad circumstances where plaintiffs propose to *imply* intent by challenging the reasonableness of a restraint relative to a legitimate objective. Certainly, *Hasty* did not hold it well established that the restrictive confinement of lawfully arrested persons without individualized suspicion of a security risk is implicitly punitive.

Meanwhile, considerable law indicates that individualized suspicion is generally *not* required to impose restrictive conditions of confinement on lawfully arrested detainees in pursuit of a legitimate security objective. *Block v. Rutherford*, 468 U.S. at 585-87, 104 S. Ct. 3227, upheld a blanket prohibition on pre-trial detainees' contact visits, observing that the "identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task," *id.* at 587, 104 S. Ct. 3227. *Bell v. Wolfish*, 441 U.S. at 558, 99 S. Ct. 1861, rejected a challenge to body cavity searches of all pre-trial detainees after contact visits even though there had been only a single past incident of contraband being concealed in a body cavity. *Whitley v. Albers*, 475 U.S. at 316, 106 S. Ct. 1078, held, in the context of a prison riot, that a "shoot low" (*i.e.*, below vital organs) policy could be applied without individual suspicion to any prisoner climbing stairs leading to where hostages were being

held. Most recently, *Florence v. Board of Chosen Freeholders*, 132 S. Ct. at 1523, upheld visual strip searches of all arrestees without individualized suspicion.[35]

The reasoning of these cases applies with equal, if not more, force here where defendants had an obvious and legitimate interest in identifying anyone connected with the 9/11 attacks and in safeguarding the nation from further terrorist attacks. Because the attacks were carried out by Arab Muslim aliens who proclaimed themselves members of al Qaeda, it is "no surprise" that authorities focused their investigative and preventative attention on persons encountered in the course of the FBI's 9/11 investigation, who were not lawfully in this country, and who fell within the same ethnic and religious group as the hijackers or as those targeted for recruitment by al Qaeda. *Ashcroft v. Iqbal*, 556 U.S. at 682, 129 S. Ct. 1937 (recognizing that circumstances of 9/11 attacks necessarily produced "disparate, incidental impact on Arab Muslims"); *see also United States v. Farhane*, 634 F3d 127, 132 n.4 (2d Cir. 2011) (discussing "fatwa" proclaiming it religious duty of Muslims worldwide to kill

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[35] The majority attempts to distinguish these cases by saying that, in each, the Supreme Court did not state that individualized suspicion was not required but, rather, determined that the challenged restrictions reasonably related to the legitimate object of prison security. *See* Majority Op., *ante* at 245-46 n.31. The reasoning is perplexing. Implicit in the rejection of challenges to generally applicable restrictive conditions of confinement is the conclusion that no individualized suspicion was necessary for the condition reasonably to relate to the legitimate object of prison security. In any event, the majority points to no case holding a generally applicable restrictive condition to fail the reasonably related inquiry for lack of individualized suspicion, and certainly not one doing so in the context of a condition whose professed object is national security.

Americans and their allies wherever found). Moreover, given (1) the inherent difficulty in identifying in advance of an FBI–CIA investigation who, among such a group of illegal aliens, might have terrorist connections; (2) the serious risk of murderous harm posed by persons with such connections (even while incarcerated[36]); and (3) events following 9/11 fueling fears of further imminent attacks,[37] I cannot conclude that established precedent would have alerted the Attorney General, the FBI Director, and the INS Commissioner that, in the absence of individualized suspicion of terrorist connections, it was arbitrary or purposeless to national security to hold such illegal aliens in restrictive, rather than general, confinement pending clearance.

In disputing that conclusion, the majority mischaracterizes this dissent to assert that "because the MDC Plaintiffs were, or appeared to be, members of the group—Arab or Muslim males—that were targeted for recruitment by al Qaeda, they may be held in the ADMAX SHU without any reasonable suspicion of terrorist activity." Majority Op., *ante* at 245. I suggest no such thing. In fact, no plaintiff was "held" on anything less than probable cause, specifically, probable cause to think the alien was in violation of federal immigration laws. Moreover, the majority itself identifies no plausible constitutional claim against the DOJ Defendants for *holding* 9/11 detainees until they were cleared of terrorism connections—even though detainees were overwhelmingly Arab

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[36] *See infra* at 249 (discussing actions of Omar Abdel Rahman and Mamdouh Mahmud Salim while incarcerated).

[37] *See supra* at 233 & n.19 (detailing anthrax scare, airliner crash, shoe bomb attempt, and journalist beheading, all within five months of 9/11 attacks).

and Muslim, and detention continued after the lists-merger decision even without individualized suspicion of terrorism for the New York list detainees. *See* Majority Op., *ante* at 238. Nor does it identify any precedent clearly establishing that substantive due process does not permit detention to be restrictive in such circumstances unless there is individualized suspicion of terrorist connections. It is in the absence of such precedent that I assert the DOJ Defendants are entitled to qualified immunity.

Nor do I suggest that government officials can "hold[ ] someone in the most restrictive conditions of confinement available simply because he happens to be—or, worse yet, appeared to be—Arab or Muslim." Majority Op., *ante* at 248. Rather, as I explain in discussing plaintiffs' equal protection claim, the pleadings do not admit a plausible inference that the MDC Plaintiffs were restrictively confined *because of* their ethnicity or religion. *See infra* Part II.B.

The majority further misconstrues the dissent "to imply that once 'national security' concerns become a reason for holding someone," there is no need to consider whether restrictive conditions reasonably relate to that objective. *See* Majority Op., *ante* at 244. Not so. *Bell v. Wolfish* makes plain that neither confinement, nor any condition of confinement, can be imposed on pre-trial detainees *for the purpose of punishment*. *See* 441 U.S. at 535, 99 S. Ct. 1861. Thus, I have never suggested that a legitimate national security purpose for holding someone supports the further imposition of restrictive conditions of confinement without any need to consider whether such conditions also reasonably relate to the same objective, or whether they are so arbitrary and purposeless as to admit

an inference that their real purpose was punishment. What I assert is that an arbitrary and purposeless conclusion as to the restrictive conditions here at issue is not so beyond debate that the DOJ Defendants can be denied qualified immunity.

To explain, isolating the 9/11 detainees confined at the MDC from one another and from the outside world while clearance investigations were conducted ensured that—in the event detainees were found to have terrorist connections—they would not have been able to communicate in ways that either furthered terrorist plans or thwarted government investigations. Further, strict restrictions on prison movement and cell conditions minimized the possibility that, while clearance was pursued, an as-yet- unidentified terrorist associate would threaten either national or prison security. We need only look to our own precedent to understand why the executive would reasonably have had such concerns. In the two years before the 9/11 attacks, convicted terrorist Omar Abdel Rahman ("the Blind Sheikh") had managed to use his lawyer to communicate from prison to followers in Egypt that he now sanctioned renewed terrorist attacks. *See United States v. Stewart*, 590 F.3d 93, 163-65 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part). Also in the year before 9/11, pre-trial detainee Mamdouh Mahmud Salim, charged with participating in the bombings of United States embassies in Africa, viciously attacked a guard at New York's Metropolitan Correctional Center with a sharpened plastic comb, causing the guard both to lose an eye and to suffer permanent brain damage. *See United States v. Salim*, 690 F.3d 115, 119-20 (2d Cir. 2012). Both men had been held in some degree of restrictive confinement. Events after 9/11, suggesting ongoing terrorist plots, *see supra* at 233

& n.19, would only have reinforced the executive's view that national security required that the MDC Plaintiffs be restrictively confined until authorities could determine whether they had terrorist connections. The majority cites no established precedent to the contrary. Nor can it ground an arbitrary and purposeless conclusion in the fact that not all New York list detainees were held in restrictive confinement pending clearance. *See* Majority Op., *ante* at 246. As the Supreme Court stated in *Bell v. Wolfish*, "the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." 441 U.S. at 554, 99 S. Ct. 1861. Its singular concern is that defendants' real purpose not be punitive.

With the benefit—or handicap—of hindsight, persons might now debate how well the challenged restrictive confinement policy at the MDC served national security interests.[28] But it is no more a judicial function to decide how best to ensure national security than it is to decide how best to operate a detention facility. *See id.* at 539, 99 S. Ct. 1861. Rather, on qualified immunity review, our task is to determine whether the MDC Plaintiffs plausibly allege a substantive due process violation that, in late 2001, was so clearly established by precedent as to put the illegality of the DOJ Defendants' actions beyond debate. *See Ashcroft v. al-Kidd*, 131 S. Ct. at 2083. For the

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[28] *See* 9/11 Report 339 (cautioning, with respect to judging actions leading and responding to 9/11 attacks, that hindsight can both make things seem "crystal clear" that at relevant time were "obscure and pregnant with conflicting meanings," and make it "harder to reimagine" the "preoccupations and uncertainty" of a past time as memories "become colored" by knowledge of what happened and was written later).

reasons stated herein, I conclude that is not this case and that the DOJ Defendants are, therefore, entitled to dismissal of plaintiffs' punitive confinement claim on the ground of qualified immunity.

2. *MDC Defendants*

By contrast to the DOJ Defendants, MDC Defendants Hasty and Sherman were personally involved in the MDC Plaintiffs' restrictive confinement in the ADMAX SHU both before and after the November 2001 merger decision.[39] As warden and deputy warden of the MDC, however, these defendants have a particular claim to judicial deference in determining the confinement conditions reasonably related to legitimate security interests. *See Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. at 1517; *Bell v. Wolfish*, 441 U.S. at 548, 99 S. Ct. 1861. The majority concludes that no such deference is warranted here because the MDC Defendants (1) imposed the conditions without adequate supporting information or an evaluation of their propriety, and (2) maintained the restrictive conditions even after learning that they were not supported by individualized suspicion of the detained aliens' terrorist connections. *See* Majority Op., *ante* at 247-48. Moreover, the majority observes that this court denied qualified immunity on a materially identical substantive due process claim in *Iqbal v. Hasty*, 490 F.3d at 143, 168-69, and identifies no reason to rule differently here. *See* Majority Op., *ante* at 251. I respectfully disagree.

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[39] The decision to impose strict restrictive confinement was apparently made at the headquarters level of the BOP, *see* OIG Report 19, with the MDC Defendants establishing the conditions effecting such confinement, *see* Compl. ¶¶ 24, 26, 68, 75.

First, plaintiffs' pleadings do not admit a plausible inference that Hasty and Sherman imposed restrictive conditions of confinement without any supporting information or assessment of propriety. As to the latter, the OIG Report recounts that, immediately after the 9/11 attacks, BOP Headquarters ordered that "all detainees who were 'convicted of, charged with, associated with, or in any way linked to terrorist activities' . . . be placed in the highest level of restrictive detention." OIG Report 112. A plausible inference of punitive intent cannot reasonably be drawn from the MDC Defendants' carrying out this order without making an independent assessment of its categorical need. The obvious and more likely motivation for their doing so is national and prison security. Defendants reasonably deferred to their superiors' assessment that, in the aftermath of a devastating terrorist attack, lawfully arrested illegal aliens, whom the FBI and CIA were investigating for possible terrorist connections, should be kept "in the most secure conditions available until the suspects could be cleared of terrorist activity." *Ashcroft v. Iqbal*, 556 U.S. at 683, 129 S. Ct. 1937. The Supreme Court has already held that such motivation does not admit a plausible inference of discriminatory intent. *See id.* No more will it admit a plausible inference of punitive intent.

Further, because it is undisputed that the FBI had designated each MDC Plaintiff as a person "of high interest," or "of interest" in their ongoing terrorism investigation, and that BOP employees relied on this designation in imposing restrictive confinement, *see, e.g.*, Compl. ¶¶ 1-2, 4; *see also* OIG Report 111-12, 126, 158, it cannot be said that the MDC Defendants acted without *any* information so as to admit an inference that their conduct was arbitrary or purposeless. *See generally Martinez v.*

Simonetti, 202 F.3d 625, 635 (2d Cir. 2000) (holding that police may reasonably rely on information provided by other officers even when confronted with conflicting accounts). Thus, these allegations do not plausibly imply discriminatory intent.

Second, insofar as plaintiffs fault the MDC Defendants for maintaining them in restrictive confinement even after learning that the FBI's designations were not based on individualized suspicion, I have already explained with reference to the DOJ Defendants why established precedent does not support that conclusion, much less alert every reasonable federal official that restrictive confinement in the absence of individualized suspicion of a security threat violates substantive due process. *See supra* at 247.

Iqbal v. Hasty, 490 F.3d 143, does not dictate otherwise. As discussed *supra* at 246-47, the court there applied a "notice pleading standard" to "general allegations of knowledge" to identify alleged "purposeful infliction of restraints that were punitive in nature." *Id.* at 169. In thus identifying *express* punitive intent, *Hasty* never discussed whether the pleadings otherwise plausibly implied intent. Although the MDC Defendants were not parties in *Ashcroft v. Iqbal*, the Supreme Court's rejection of the pleading standard employed in *Hasty*, *see* 556 U.S. at 684, 129 S. Ct. 1937, does not admit preclusive effect to *Hasty's* assessment of the sufficiency of plaintiffs' specific intent claims, particularly insofar as they imply intent.[40]

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[40] Indeed, when reviewing *Turkmen I* in light of *Ashcroft v. Iqbal*, we vacated the district court's decision and remanded "for further proceedings consistent with the standard articulated in *Twombly* and *Iqbal*." *Turkmen II*, 589 F.3d at 546-47. On remand, the

Accordingly, I would dismiss plaintiffs' policy-challenging punitive confinement claim against the MDC Defendants, as well as the DOJ Defendants, on grounds of qualified immunity.[41]

C. Discriminatory Confinement

To state a Fifth Amendment claim for discriminatory confinement, a plaintiff must plead sufficient factual matter to show that defendants adopted the challenged restrictive confinement policy not for a neutral reason "but for the purpose of discriminating on account of race, religion, or national origin." *Ashcroft v. Iqbal*, 556 U.S. at 676-77, 129 S. Ct. 1937 (explaining that standard is not satisfied by pleadings of intent as "volition" or "awareness of consequences"; instead, pleadings must plausibly allege that defendant undertook conduct "because of," not merely "in spite of[,]" its discriminatory effect). The Supreme Court articulated this standard in reversing this court's determination that these plaintiffs' original complaint stated a plausible claim for discriminatory confinement based on race, religion, or national origin. *See id.* at 687, 129 S. Ct. 1937. While acknowledging that plaintiffs had pleaded facts "consistent with" purposeful discrimination, the Court concluded that such a claim was not plausible in light of the "obvious," and "more likely" non-discriminatory reason for the challenged confinement policy, specifically, national security concerns about "potential connections" between illegal aliens identified in the

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district court did not cite *Hasty* in identifying a plausible punitive confinement claim against the MDC Defendants. *See Turkmen III*, 915 F. Supp. 2d at 341. These developments do not comport with a conclusion that *Hasty* is dispositive on this appeal.

[41] This dissent does not pertain to plaintiffs' non-policy claims of "unofficial abuse" against the MDC Defendants.

course of the FBI's investigation of the 9/11 attacks and Islamic terrorism. *Id.* at 682-83, 129 S. Ct. 1937 (holding that, where all pleadings "plausibly suggest[ ] is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," plaintiffs "would need to allege more by way of factual content to nudge [their] claim[s] of purposeful discrimination across the line from conceivable to plausible" (internal quotation marks omitted)).

One might have thought that put plaintiffs' policy-challenging claims of discriminatory confinement to rest. The majority, however, affords the MDC Plaintiffs another opportunity to pursue these claims, concluding that the newest amended complaint now pleads sufficient facts to show that it is "not more likely" that the MDC Plaintiffs were held in restrictive confinement because of suspected ties to terrorism. Majority Op., *ante* at 255.

The pleadings the majority cites to support this conclusion as to both the DOJ and MDC Defendants can be summarized as follows: (1) the New York FBI office expressly relied on race, religion, ethnicity, and national origin in targeting persons identified in their 9/11 investigation for detention; (2) the DOJ Defendants were aware of and condoned such discriminatory intent by merging the New York FBI detainee list with the INS national detainee list, knowing that the former list was not supported by individualized suspicion of a terrorist threat; (3) the MDC Defendants also knew there was no individualized suspicion tying the aforementioned detainees to terrorism when they confined them in the ADMAX SHU; and (4) the MDC Defendants falsely

reported that MDC staff had classified the ADMAX SHU detainees as "high security" based on an individualized assessment when no such assessment was ever conducted. *See id.* at 244-47. I am not persuaded.

First, the amended complaint's pleadings of purposeful FBI discrimination are not materially different from those considered in *Ashcroft v. Iqbal*. *See* 556 U.S. at 669, 129 S. Ct. 1937 (acknowledging that plaintiffs pleaded purposeful designation of detainees based on race, religion, or national origin); *see also id.* at 698, 129 S. Ct. 1937 (Souter, J., dissenting) (detailing specific allegations that FBI officials implemented policy that discriminated against Arab Muslim men based solely on race, religion, or national origin). Thus, we are bound by the Supreme Court's holding that such allegations are inadequate to plead plausible discriminatory intent in light of the obvious and more likely national security explanation for the challenged confinement. *See id.* at 681-82, 129 S. Ct. 1937.

Not insignificantly, in reaching this conclusion, the Supreme Court acknowledged that it was the perpetrators of the 9/11 attacks who injected religion and ethnicity into the government's investigative and preventative efforts. The Court stated that the attacks "were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples." *Id.* at 682, 129 S. Ct. 1937. Where a terrorist group thus effectively defines itself by reference to religion and ethnicity, *see supra* at 248, the Constitution does not require investigating authorities to ignore that reality nor to dilute limited re-

sources casting a wider net for no good reason. It is "no surprise" then that a law enforcement policy—including a restrictive confinement policy—legitimately aimed at identifying persons with connections to the 9/11 attacks and preventing further attacks "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Ashcroft v. Iqbal*, 556 U.S. at 682, 129 S. Ct. 1937; *see also Brown v. City of Oneonta*, 221 F.3d at 337 (observing that racial description of perpetrator, "which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found," even though it might well have disparate impact on minority groups).[42]

Thus, as in *Ashcroft v. Iqbal*, plaintiffs cannot plausibly imply proscribed discriminatory intent from pleadings merely "consistent with" the New York FBI's alleged purposeful targeting and detention of aliens based on ethnicity and religion. 556 U.S. at 681-82, 129 S. Ct. 1937. Here, those characteristics originated with the terrorists not the state, the FBI actions were limited to aliens not lawfully in this country and encountered in the course of the 9/11 investigation, and the obvious and more

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[42] In recently forbidding investigative stereotyping, the Department of Justice nevertheless stated that, "in conducting activities directed at a specific criminal organization or terrorist group whose membership has been identified as overwhelmingly possessing a listed characteristic, law enforcement should not be expected to disregard such facts in taking investigative or preventive steps aimed at the organizations' activities." U.S. Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* 4 (Dec. 2014), *available at* http://1.usa.gov/1ytxRoa.

likely reason for the challenged confinement was ensuring national security in the face of an Islamic terrorist threat.[43]

Second, the DOJ Defendants' purported involvement with the lists-merger decision also cannot imply these defendants' discriminatory intent. As I have already explained with respect to punitive intent, plaintiffs fail plausibly to plead these defendants' involvement with that decision. *See supra* at 228-42.

In any event, the merger decision—by whomever made—applied equally to all New York list detainees, the larger number of whom were not subjected to restrictive confinement, but housed in general prison population at the Passaic County Jail, even though they shared the same racial, religious, and national identities as the MDC

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[43] In discussing the actions of the New York FBI office—and particularly its maintenance of its own list of 9/11 detainees—the OIG and the majority reference that office's tradition of independence from headquarters. *See* Majority Op., *ante* at 232 n.12 (citing OIG Report 54). Such independence does not plausibly imply rogue conduct. To the contrary, in the years before 9/11, the New York FBI office led the nation's pursuit of Islamic terrorism, as is evident in a number of exemplary investigations. *See, e.g.*, 9/11 Report 72 (commending "superb investigative and prosecutorial effort" of New York FBI and U.S. Attorney's Office in identifying and convicting perpetrators of first World Trade Center attack, as well as the "Blind Sheikh" and Ramzi Yousef); *see also In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93 (affirming New York convictions for terrorist bombings of American embassies in Africa based on guilty verdicts returned only weeks before 9/11). In short, at the time of the 9/11 investigation, there was no FBI field office with greater knowledge of, or experience investigating, Islamic terrorism than that in New York. This, and not invidious discriminatory intent, is the obvious and more likely explanation for its independence.

Plaintiffs. *See supra* at 242-43. Such circumstances do not permit discriminatory intent plausibly to be inferred from the merger decision. *See generally O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996) (holding that inference of age discrimination cannot be drawn from "replacement of one worker with another worker insignificantly younger"); *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000) (stating that *prima facie* case for discrimination required proof of employer "preference for a person not of the protected class"). Indeed, the conclusion that a plaintiff cannot urge an inference of discriminatory purpose from his receipt of treatment less favorable than most members of his own protected class is so obvious that we generally pronounce it summarily. *See, e.g., Fleming v. MaxMara USA, Inc.*, 371 Fed. Appx. 115, 117 (2d Cir. 2010) (summary order). District court opinions in this circuit to the same effect are countless. *See, e.g., Baez v. New York*, 56 F. Supp. 3d 456, 467-68 (S.D.N.Y. 2014) (collecting cases); *White v. Pacifica Found.*, 973 F. Supp. 2d 363, 381 (S.D.N.Y. 2013) (collecting cases). Thus, no clearly established law would have alerted every reasonable official that the lists-merger decision violated equal protection.[44]

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[44] The majority recognizes that the precedent cited herein undermines plaintiffs' equal protection claim, but it maintains that these holdings properly apply on summary judgment review, not dismissal. *See* Majority Op., *ante* at 256 n.39. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), does not admit that conclusion. Therein, the Supreme Court observed that it had earlier ruled "at the summary judgment stage" that an inference of anticompetitive collusion could not be drawn from parallel conduct. *Id.* at 554, 127 S. Ct. 1955 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,

In concluding otherwise, the majority dismisses the Passaic assignments as a "red herring." Majority Op., *ante* at 242. The label will not stick. The reality that most Arab Muslim detainees on the New York list were *not* held in restrictive confinement precludes a plausible inference that arresting FBI agents were intent on discriminating against Arab Muslims in assigning a minority of New York detainees to the MDC. Thus, even if the lists-merger decision can be understood to manifest the DOJ Defendants' "deference to others' designation of detainees for particular facilities," *id.* at 256, that is not a factual basis for plausibly inferring their discriminatory intent against MDC detainees. To overcome this hurdle, the majority parenthetically suggests that "for all [the DOJ Defendants'] knew, all" New York list detainees were held in restrictive confinement. *Id.* This is, again, pure speculation. Moreover, because the facts are to the contrary, a plaintiff (or a panel majority) looking to locate invidious intent in defendants' *possible misunderstanding* of the confinement circumstances surely needs to identify some factual basis for its hypothesis. *See Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. That is missing here.

In sum, plaintiffs fail plausibly to plead either that DOJ Defendants were responsible for the lists-merger

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106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). It then applied that same rule at the motion to dismiss stage, holding that where plaintiffs' pleadings, taken as true, show only parallel conduct, a conspiracy is not plausibly alleged. *See id.* at 556, 127 S. Ct. 1955. The same principle applies here. Just as evidence of differential treatment within a suspect class is insufficient on summary judgment to demonstrate proscribed discriminatory intent, allegations of such differential treatment are insufficient to plead discriminatory intent so as to defeat a motion for dismissal.

decision or that the decision was animated by discriminatory intent.

Third, allegations that the DOJ and MDC Defendants maintained the challenged restrictive confinement after learning that the FBI designations were not based on individualized suspicion of terrorist threats are also inadequate to conclude that defendants were "not more likely" concerned with ensuring national and prison security. Majority Op., *ante* at 299. Indeed, the conclusion is foreclosed by *Ashcroft v. Iqbal*, 556 U.S. at 681-82, 129 S. Ct. 1937, because the discrimination allegations there deemed implausible in light of the more likely national security explanation for defendants' actions included assertions that the MDC Plaintiffs' restrictive confinement was not supported by "any individual determination" that such restrictions were "appropriate or should continue." First Am. Compl. ¶ 97, App. to Pet. for Cert. 173a, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008), *available at* http://1.usa.gov/1CfHJQF. Thus, the majority cannot suggest that when the Supreme Court there rejected an equal protection challenge to efforts by "the Nation's top law enforcement officers . . . to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," *Ashcroft v. Iqbal*, 556 U.S. at 682-83, 129 S. Ct. 1937, it did not understand that plaintiffs were complaining of the lack of prior individualized suspicion. *See* Majority Op., *ante* at 254-55.[45]

In any event, and as already explained, courts have upheld the imposition of restrictive conditions of con-

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[45] The lists-merger pleadings support no different conclusion for reasons just discussed. *See* Majority Op., *ante* at 255-56.

finement on lawfully arrested persons without requiring individualized suspicion of a security threat, recognizing both the difficulty in identifying which detainees pose the particular risk needing to be addressed, and the serious harm that can ensue from a failure to do so. *See supra* at 247-48. Thus, no clearly established law would have alerted reasonable officials that restrictive confinement without individualized suspicion was unconstitutionally punitive or discriminatory in the circumstances presented here.

Fourth, allegations that the MDC Defendants (1) failed to follow BOP procedures requiring "individualized determination of dangerousness or risk" for restrictive confinement, and (2) approved documents falsely representing that such determinations had been made, also do not render it "not more likely" that the challenged conduct was motivated by national security. *See* Majority Op., *ante* at 256. This court has already granted qualified immunity to some of these same MDC Defendants on a procedural due process challenge to their failure to follow BOP procedures in connection with the same challenged confinement. *See Iqbal v. Hasty*, 490 F.3d at 167-68. In doing so, moreover, *Hasty* acknowledged that the "separation" of the MDC Plaintiffs "from the general prison population could be reasonably understood . . . to relate to matters of national security, rather than an ordinary criminal investigation." *Id.* at 167. *Hasty* further noted that, in 2001-2002, neither the Supreme Court nor this court had considered whether BOP administrative segregation procedures had to be afforded "to persons detained under special conditions of confinement until cleared of connection with activities threatening national security." *Id.*

The fact that plaintiffs here use procedural failures to imply discriminatory intent rather than to assert a denial of procedural due process warrants no different qualified immunity conclusion. As the OIG Report indicates, by October 1, 2001, BOP Headquarters had effectively ceded "individualized" risk assessment responsibility for 9/11 detainees to the FBI. A memorandum of that date from Michael Cooksey, the BOP Assistant Director for Correctional Programs, "directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be 'reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist activities.'" OIG Report 116 (quoting Cooksey's October 1, 2001 memorandum). In these circumstances, even if the MDC Defendants might be faulted for approving documents suggesting individualized risk assessments of MDC Plaintiffs that were not made by the BOP, their actions cannot plausibly imply discriminatory intent because they are obviously and more likely explained by reliance on the FBI's designations of each MDC Plaintiff as a person "of high interest," or "of interest," to the ongoing terrorism investigation.

In sum, as to both the DOJ and MDC Defendants, the pleadings highlighted by the majority are insufficient to render "not more likely" what the Supreme Court in *Ashcroft v. Iqbal* held "obvious" and "more likely": MDC Plaintiffs were restrictively confined pending FBI–CIA clearance for the legitimate purpose of ensuring national security. 556 U.S. at 681-82, 129 S. Ct. 1937. Moreover, to the extent the majority implies discriminatory intent from the MDC Plaintiffs' restrictive confinement without individualized suspicion of terrorist connections, no clear-

ly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance. Accordingly, I conclude that both the DOJ and the MDC Defendants are entitled to dismissal of the MDC Plaintiffs' equal protection claims on the ground of qualified immunity.[46]

D. *Fourth Amendment Claim*

As the majority acknowledges, plaintiffs do not assert that the Fourth Amendment absolutely prohibited them from being strip-searched while incarcerated at the MDC. *See* Majority Op., *ante* at 258. Rather, plaintiffs contend that the frequency with which they were strip searched—every time they were removed from or returned to their cells, or randomly even when not so moved, "even when they had no conceivable opportunity to obtain contraband"—was constitutionally unreasonable. Compl. ¶ 112. They further allege that the manner in which they were strip searched—with female officers present or in view of other prisoners and staff, with prohibited videotaping, or with humiliating comments—was unconstitutional. *See id.* ¶¶ 112-15.

Insofar as plaintiffs seek damages from MDC Defendants Hasty and Sherman for the challenged strip search policy, *Ashcroft v. Iqbal* does not admit a theory of

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[46] Because I would dismiss plaintiffs' equal protection claims, I would also dismiss their § 1985 claims. *See Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971) ("The language [in § 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."); *accord Reynolds v. Barrett*, 685 F.3d 193, 201-02 (2d Cir. 2012).

supervisory liability on a *Bivens* claim. *See* 556 U.S. at 676-77, 129 S. Ct. 1937. Rather, plaintiffs must plausibly plead that each *Bivens* defendant, "through the official's own individual actions, has violated the Constitution." *Id.* at 676, 129 S. Ct. 1937. Plaintiffs do not allege that Hasty and Sherman themselves ever participated in any of the challenged strip searches or that they personally developed the policy. The latter conduct is attributed to MDC First Lieutenant Joseph Cuciti. *See* Compl. ¶ 111.

The majority nevertheless concludes that plaintiffs carry their *Iqbal* pleading burden by alleging that (1) "Hasty ordered [MDC Captain] Lopresti and Cuciti to design extremely restrictive conditions of confinement," which were "then approved and implemented by Hasty and Sherman," *id.* ¶ 75; and (2) many of the strip searches "were documented in a 'visual search log' created by MDC staff for review by MDC management, including Hasty," *id.* ¶ 114. The majority holds that these pleadings are sufficient to allege Hasty's and Sherman's personal involvement "in creating and executing" the challenged strip-search policy, or at least their awareness of the searches "based on the search log." Majority Op., *ante* at 261. It then further concludes that neither Hasty nor Sherman is entitled to qualified immunity because, at the time of the MDC Plaintiffs' confinement, it was clearly established that strip searches had to be "'rationally related to legitimate government purposes.'" *Id.* at 261 (quoting *Iqbal v. Hasty*, 490 F.3d at 172). I cannot join in this reasoning.

First, insofar as plaintiffs challenge the frequency of the strip searches, it is their burden to plead facts sufficient to demonstrate that the challenged policy lacked a rational relationship to a legitimate government objec-

tive, specifically, prison security. *See Turner v. Safley*, 482 U.S. at 89, 107 S. Ct. 2254 (establishing standard for challenging prison regulation); *Covino v. Patrissi*, 967 F.2d at 78-80 (applying standard to body-cavity search challenge). That burden is, moreover, a heavy one because it requires a showing that the "logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner v. Safley*, 482 U.S. at 89-90, 107 S. Ct. 2254. I do not think plaintiffs' pleadings plausibly allege that the frequency with which they were strip searched was so unrelated to prison security as to be arbitrary or irrational.

Plaintiffs assert that they were strip searched "even when they had no conceivable opportunity to obtain contraband." Compl. ¶ 112. The conclusion borrows from *Hodges v. Stanley*, a case in which this court reinstated a complaint challenging a second strip search under circumstances where "it seems clear that there was no possibility that Hodges could have obtained and concealed contraband." 712 F.2d 34, 35 (2d Cir. 1983). *Hodges*, however, was decided before *Turner* and *Covino*. Thus, courts cannot assume that its "no possibility" to obtain contraband conclusion invariably equates to the required showing of no rational relationship to a legitimate government purpose. Notably, *Hodges* reached the "no possibility" conclusion in circumstances where the prisoner had been searched "*immediately* prior to the search forming the basis of his complaint." *Id.* at 35 (emphasis added). Plaintiffs here allege no such immediately successive—and, therefore, purposeless—strip searches. Rather, they complain of random strip searches in their cells or of required strip searches in circumstances involving intervening events—e.g., before and after non-contact visits—that *plaintiffs* conclusorily maintain af-

forded them no opportunity to receive contraband. *See* Compl. ¶ 112. In the aftermath, however, of an all-too-successful attack on a BOP guard by a restrictively confined terrorist suspect, *see United States v. Salim*, 690 F.3d at 119-20, it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both randomly in their cells and whenever they were moved from one location to another to ensure prison security. *Hodges* cannot be read to make clear to every reasonable officer that such searches were unconstitutional. Indeed, this is precisely the sort of "difficult judgment[ ] concerning institutional operations" that the Supreme Court has concluded must be made by "prison administrators . . . , and not the courts." *Turner v. Safley*, 482 U.S. at 89, 107 S. Ct.2254 (internal quotation marks omitted).[47]

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[47] The majority's reliance on *Iqbal v. Hasty*, 490 F.3d at 172, in holding otherwise, *see* Majority Op., *ante* at 246-47, is misplaced for the reasons already discussed. *See supra* at 246-47.

So too is its citation to *N.G. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004). *See* Majority Op., *ante* at 261 n.44. There, this court held that repetitive strip searches after supervisory transport of persons confined in *juvenile* facilities were not reasonable under the Fourth Amendment in the absence of reason to suspect the juvenile's possession of contraband. *See N.G. v. Connecticut*, 382 F.3d at 233-34. It is hardly apparent that the same conclusion applies where the persons being searched are adults and where they are being confined subject to clearance of terrorist activities. The higher risks to prison and public safety of missed contraband in that circumstance, as well as terrorists' proved ability to evade even restrictive confinement does not admit a conclusion that *N.G.* clearly established unreasonableness in the context here at issue. *See generally id.* at 234 (acknowledging that continuous custody cannot "guarantee" protection for subsequent access to contraband).

Even if such a conclusion were possible, however, *N.G.* was not

Second, with respect to the manner in which the searches were conducted, plaintiffs' claims against Hasty and Sherman depend on these defendants' review of a visual search log allegedly created by MDC staff for management. The "possibility" that defendants reviewed such logs is not enough, however, to state a plausible claim against them for the manner of the searches. *Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937 (stating that "plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully"). Indeed, even if their review of the logs were plausible, it would, at best, support an inference of Hasty's and Sherman's knowledge of the manner in which the searches were being conducted. Further facts indicating more than negligence in these defendants' failure to take corrective action would be necessary plausibly to plead that through their "own individual actions," each had "violated the Constitution." *Id.* at 676, 129 S. Ct. 1937; *see also, e.g., O'Neill v. Krzeminski*, 839 F.2d 9, 11 n.1 (2d Cir. 1988) ("Negligence is not a basis of liability for constitutional torts.").

I would thus grant Hasty and Sherman dismissal of the MDC Plaintiffs' Fourth Amendment claim on the ground of qualified immunity.

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In sum, I respectfully dissent from the judgment entered on appeal in this case insofar as it allows the MDC Plaintiffs to pursue money damages on policy-

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decided until *2004*. Thus, the majority can hardly rely on that decision as the clearly established law that, in late *2001*, put beyond debate that the strip-search policy here at issue violated the Fourth Amendment.

challenging Fifth Amendment claims for punitive and discriminatory confinement against defendants Ashcroft, Mueller, Ziglar, Hasty, and Sherman, and an attendant policy-challenging Fourth Amendment claim for unreasonable strip searches against defendants Hasty and Sherman. I conclude that no established *Bivens* action is available for plaintiffs to pursue these claims and that significant factors counsel hesitation in extending *Bivens* to an action challenging executive policy pertaining to immigration and national security made in a time of crisis. In any event, I would grant defendants' motions for dismissal on grounds of qualified immunity because plaintiffs fail either to plead plausible constitutional violations or to demonstrate that clearly established law would have alerted every reasonable official that the challenged actions were unlawful.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 02-CV-2307

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA RAJ BAJRACHARYA ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER (MDC), MICHAEL ZENK, FORMER WARDEN MDC, JAMES SHERMAN, FORMER MDC ASSOCIATE WARDEN FOR CUSTODY, SALVATORE LOPRESTI, FORMER MDC CAPTAIN, AND JOSEPH CUCITI, FORMER MDC LIEUTENANT, DEFENDANTS

Jan. 15, 2013

MEMORANDUM AND ORDER

JOHN GLEESON, District Judge.

Plaintiffs Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya bring this putative class action against John Ashcroft, Robert Mueller, James Ziglar, Dennis Hasty, Michael Zenk, James Sherman, Salvatore Lopresti, and Joseph Cuciti. Plaintiffs were arrested and detained by federal authorities in connection with the investigation of the terrorist attacks of September 11, 2011. They bring six *Bivens* claims and a seventh claim under 42 U.S.C. § 1985, all arising out of their allegations of discriminatory and punitive detention. The defendants have now moved to dismiss. For the reasons set forth below, the defendants' motions are granted in part and denied in part.

Specifically, the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two and Six) shall proceed against Hasty, Zenk, Sherman, Lopresti, and Cuciti. To the extent they are alleged against Ashcroft, Mueller and Ziglar,[1] the allegations are insufficient and the claims are therefore dismissed as against them. As for the claimed deprivation of the plaintiffs' free exercise rights (Claim Three), I hold that the *Bivens* damages remedy is extended to this context and that the claim shall proceed against Hasty, Zenk, Sherman, Lopresti, and Cuciti. It is insufficiently pled against Ashcroft, Mueller and Ziglar and is therefore dismissed as against them. The claims based on the alleged communications blackout and interference with counsel (Claims Four and Five) are dismissed as to all de-

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[1] These three defendants are not named as defendants in Claim Six, which focuses specifically on strip searches.

fendants on the ground of qualified immunity. Finally, the conspiracy claim (Claim Seven) shall proceed, but only to the extent that the underlying objects of the conspiracy (Claims One through Six) have survived the motion. Thus, it is dismissed as against Ashcroft, Mueller and Ziglar and shall proceed to the extent it alleges a conspiracy by the remaining defendants to commit the civil rights violations alleged in Claims One, Two, Three and Six.

In sum, the case against Ashcroft, Mueller and Ziglar is dismissed in its entirety. Only Claims Four and Five (and the part of Claim Seven that alleges a conspiracy to commit the wrongs charged in Claims Four and Five) are dismissed as against the other defendants. Counsel for the remaining parties are directed to appear before Chief Magistrate Gold for a status conference on January 30, 2013 at 2:00 PM.

BACKGROUND

A. *Factual Allegations*

1. *Overview*

The plaintiffs are eight male, non-United States citizens who were arrested on immigration charges following the terrorist attacks on September 11, 2001 ("9/11 attacks"). They were held in immigration custody for periods ranging from three to eight months after receiving final orders of removal or grants of voluntary departure. All but two are Muslims of Middle Eastern, North African, or South Asian origin; the others, natives of India and Nepal, are Hindu. Plaintiffs bring this putative class action on behalf of themselves and a class of male non-citizens who are Arab or Muslim, or were perceived by the

defendants to be Arab or Muslim,[2] and were (1) arrested by the Immigration and Naturalization Service ("INS") or the Federal Bureau of Investigation ("FBI") after September 11, 2001, and charged with immigration violations; (2) treated as "of interest" to the government's terrorism investigation; (3) detained under a blanket "hold-until-cleared" policy, pursuant to which they were held without bond until cleared of terrorist ties by the FBI; and (4) confined in the Metropolitan Detention Center ("MDC") or the Passaic County Jail ("Passaic Jail"). I refer to the putative class as the "Detainees."

The Complaint names the following individuals as defendants: (1) John Ashcroft, the former Attorney General of the United States, Robert Mueller, the Director of the FBI, and James W. Ziglar, the former Commissioner of the INS (collectively, the "DOJ defendants"); (2) Dennis Hasty and Michael Zenk, both former wardens of the MDC; and (3) James Sherman, Salvatore Lopresti, and Joseph Cuciti, all former MDC officials of a rank below warden. I refer to Hasty, Zenk, Sherman, Lopresti, and Cuciti collectively as the "MDC defendants."

2. *The Treatment of the Detainees*[3]

In the aftermath of the 9/11 attacks, the defendants acted together to create and implement a series of policies

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[2] Hereinafter, mention of Arab and/or Muslim individuals includes individuals who were perceived by the defendants to be Arab and/or Muslim.

[3] The factual allegations set forth herein are drawn from the Complaint and two incorporated reports by the Office of the Inspector General to the extent those reports are not contradicted by the allegations of the Complaint. ¶ 3 n.1. All citations in this opinion preceded by "¶" or "¶¶" refer to paragraphs of the Complaint.

and practices relating to the identification, detention, and treatment of Arab and Muslim noncitizens who had violated immigration laws (*i.e.*, the Detainees). I refer to this series of policies and practices in the aggregate as the "detention policy." Pursuant to the detention policy, the Detainees were rounded up and detained on their immigration violations so government officials could question them in connection with the ongoing investigation of the 9/11 attacks (the "PENTTBOM investigation"); they were treated as "of interest" to the PENTTBOM investigation, which meant that they were deemed to be potential terrorists despite the fact that they had been arrested based on immigration violations, not on suspicion of terrorist activity; they were subject to a hold-until-cleared policy, under which they were held for lengthy periods of times —often for months after they were ordered removed from the country—until the FBI affirmatively cleared them of suspicion of wrongdoing; and they were held until their release in extremely restrictive conditions of confinement. The only aspect of the detention policy challenged in the Complaint is the confinement of the Detainees in harsh conditions ("harsh confinement policy").

The harsh confinement policy, which was created by the DOJ defendants, was a directive to hold the Detainees in restrictive conditions under which they would feel maximum pressure to cooperate with the PENTTBOM investigation. Although this policy mandated that the Detainees' ability to contact the outside world be limited, it did not specify the precise conditions in which they would be held. Rather, the harsh confinement policy was a general mandate, and the exact manner of its imple-

mentation was to be determined by officials at the facilities in which the Detainees were held.[4]

The harsh confinement policy was expressly directed at Arab and Muslim noncitizens who had violated immigration laws: It mandated restrictive conditions specifically for Arab and Muslim individuals. In other words, it was discriminatory on its face. This is not to say that no non-Arabs and non-Muslims were held in harsh conditions of confinement as a result of the investigation following the 9/11 attacks. Other individuals may have been held in such conditions pursuant to other policies or for other reasons. However, the harsh confinement policy expressly applied to Arab and Muslim individuals, dictating that those detained under the policy be held in harsh conditions of confinement—not because of any suspected links to terrorism, but because of their race, national origin, and/or religion.

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[4] Plaintiffs allege that Ashcroft and Mueller "mapped out ways to exert maximum pressure" on the Detainees, and that Ashcroft "created many of the unreasonable and excessively harsh conditions" under which the Detainees were held, ¶ 21. These allegations imply that the harsh confinement policy mandated some of the specific conditions that the Detainees endured at the MDC, but the plaintiffs have never specified what those particular conditions were. Moreover, as discussed more fully below, the plaintiffs concede that the specific conditions in which the Detainees were held were created by the MDC defendants in implementing the harsh confinement policy. *See* ¶ 65 ("The punitive conditions in which MDC Plaintiffs and class members were placed were the *direct result* of the strategy mapped out by Ashcroft and Mueller's small working group.") (emphasis added); Pls.' Opp. Mot. to Dismiss 3, ECF No. 749 ("[I]t does not appear that Ashcroft's small group personally designed the details of every restrictive condition. . . .").

The harsh confinement policy was implemented by the MDC defendants in the following way: The Detainees (the "MDC Detainees") were placed in that facility's Administrative Maximum Special Housing Unit (the "ADMAX SHU"). There, they were confined in tiny cells for over 23 hours a day, provided with meager and barely edible food, and prohibited from moving around the unit, using the telephone freely, using the commissary, accessing MDC handbooks (which explained how to file complaints about mistreatment), and keeping any property, including personal hygiene items like toilet paper and soap, in their cells. Whenever they left their cells, they were handcuffed and shackled. Although they were offered the nominal opportunity to visit the recreation area outside of their cells several times a week, the recreation area was exposed to the elements and the MDC Detainees were not offered clothing beyond their standard cotton prison garb and a light jacket. Furthermore, detainees who accepted such offers were often physically abused along the way, and were sometimes left for hours in the cold recreation cell, over their protests, as a form of punishment. As a result, they were constructively denied exercise during the fall and winter.

The MDC Detainees also were denied sleep. Bright lights were kept on in the ADMAX SHU for 24 hours a day (until March 2002), and staff at the MDC made a practice of banging on the MDC Detainees' cell doors and engaging in other conduct designed to keep them from sleeping. They also conducted inmate "counts" at midnight, 3:00 a.m., and 5:00 a.m. While such counts are inherently disruptive—officers are required to see the skin of each inmate being counted, *see* BOP P.S. 5500.09—the officers "went beyond what was required for the count by kicking the door hard with their boots, knocking on the

door at night much more frequently than required, and making negative comments when knocking on the door." ¶ 39. For example, for the first two or three weeks that one detainee was in the ADMAX SHU, one of the officers walked by about every 15 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to America." ¶ 36. In addition, officers used the in-cell camera to watch one detainee, and when he would appear to fall asleep they would kick the cell door.

The MDC Detainees also were subjected to frequent physical and verbal abuse by many of the officers in the ADMAX SHU. The physical abuse included slamming the MDC Detainees into walls; bending or twisting their arms, hands, wrists, and fingers; lifting them off the ground by their arms; pulling on their arms and handcuffs; stepping on their leg restraints; restraining them with handcuffs and/or shackles even while in their cells; and handling them in other rough and inappropriate ways. The use of such force was unnecessary because the MDC Detainees were always fully compliant with orders and rarely engaged in misconduct. The verbal abuse included referring to the MDC Detainees as "terrorists" and other offensive names, threatening them with violence, cursing at them, insulting their religion, and making humiliating sexual comments during strip-searches.

Both the MDC Detainees and the Detainees held at the Passaic Jail (the "Passaic Detainees") were subjected to unreasonable and punitive strip-searches. The MDC Detainees were strip-searched every time they were removed from or returned to their cells, including before and after visiting with their attorneys, receiving medical

care, using the recreation area, attending a court hearing, and being transferred to another cell. They were strip-searched upon each arrival at the MDC in the receiving and discharge area and again after they had been escorted—shackled and under continuous guard—to the ADMAX SHU. These strip-searches occurred even when they had no conceivable opportunity to obtain contraband, such as before and after non-contact attorney visits (to and from which they were escorted—handcuffed and shackled—by a four-man guard). Supp. OIG Rep. at 3. The MDC had no written policy governing when to conduct strip-searches, and they were conducted inconsistently.

The strip-searches were unnecessary to security within the MDC. Rather, they were conducted to punish and humiliate the detainees. Female officers were often present during the strip-searches; the strip-searches were regularly videotaped in their entirety (contrary to BOP policy, *see* BOP PS. 5521.05); and MDC officers routinely laughed and made inappropriate sexual comments during the strip-searches.

Officers at the MDC and the Passaic Jail also interfered with the Detainees' ability to practice and observe their Muslim faith. Specifically, when the Detainees requested copies of the Koran, officers delayed for weeks or months before providing them; the MDC and the Passaic Jail failed to provide food that conformed to the Halal diet, despite the Detainees' requests for such food; the MDC had no clock visible to the MDC Detainees, and officers regularly refused to tell them the time of day or the date so they could conform to daily Islam prayer requirements and observe Ramadan; and officers constantly interrupted the Detainees' prayers by banging on their cell

doors, yelling and making noise, screaming derogatory anti-Muslim comments, videotaping them, handing out hygiene supplies, and/or telling them to "shut the fuck up" while they were trying to pray.

In addition, most of the MDC Detainees were held incommunicado during the first weeks of their detention (the "communications blackout"). MDC staff repeatedly turned away everyone, including lawyers and relatives, who came to the MDC looking for the MDC Detainees, and thus the MDC Detainees had neither legal nor social visits during this period. This communications blackout lasted until mid-October 2011.

After the initial communications blackout, the MDC Detainees were nominally permitted one call per week to an attorney. However, MDC officers obstructed Detainees' efforts to telephone and retain lawyers in multiple ways. They were denied sufficient information to obtain legal counsel; although they were given a list of organizations that provide free legal services, the contact information for these organizations was outdated and inaccurate. Legal calls that resulted in a wrong number or busy signal were counted against their quota of calls, as were calls answered by voicemail. Officers frequently asked the MDC Detainees, "Are you okay?," and if the MDC Detainees responded affirmatively, the officers construed that as a waiver of their already-limited privilege to make legal calls. The officers also often brought the phone to the MDC Detainees early in the morning before law offices opened for the day. And they frequently pretended to dial a requested number or deliberately dialed a wrong number and then claimed the line was dead or busy. They then refused to dial again, saying that the Detainee had exhausted his quota.

When the MDC Detainees managed to reach their attorneys by phone, the officers frequently stood within hearing distance of conversations that should have been treated as privileged. Legal visits were non-contact and the MDC Detainees were handcuffed and shackled during the entirety of the visits. The MDC video- and audio-recorded the MDC Detainees' legal visits until April 2002 or later.

The MDC Detainees were nominally permitted one social call per month after the initial communications blackout. However, these calls were just as severely restricted as the legal calls. Social visits were restricted to immediate family, yet even immediate family members were sometimes turned away. As with their legal visits, social visits were non-contact and the MDC Detainees were handcuffed and shackled during the entirety of the visits.

3. *The Plaintiffs*

a. *Ahmer Iqbal Abbasi*

Abbasi, a citizen of Pakistan and a devout Muslim, entered the United States in 1993 on a visitor visa. He applied unsuccessfully for political asylum, and he remained in the United States illegally after his application was denied. He initially worked as a taxicab driver in Manhattan, saving enough money to purchase a small grocery store, which he sold sometime before 2001.

Abbasi was arrested by the FBI on September 25, 2001. He was interviewed by officials from the FBI, INS, and the New York Police Department ("NYPD"), who gave him no information regarding why he was being detained. The officials asked, among other things, about Abbasi's religious beliefs and practices. Abbasi later

learned that his arrest had resulted from a report that a "male[,] possibly Arab" (apparently Abbasi's houseguest) had presented a false Social Security card at the New Jersey Department of Motor Vehicles and had given Abbasi's address as his own. Abbasi was detained in the ADMAX SHU at the MDC.

b. *Anser Mehmood*

Mehmood, a citizen of Pakistan and a devout Muslim, entered the United States in 1989 with his wife, Uzma (Abbasi's sister), and their three children. Mehmood entered on a business visa but remained illegally after the visa expired. He started a trucking business in the United States, making enough money to purchase a home and to send funds to his extended family in Pakistan. Mehmood and his family settled in Bayonne, New Jersey. Another child, an American citizen by birth, was born in 2000. All four of the children attended public school in New Jersey. In May 2001, another of Uzma's brothers, who is an American citizen, submitted an immigration petition for Mehmood and his family.

On October 3, 2001, a team of FBI and INS agents visited Mehmood and his wife in their home based on the same report that led to Abbasi's arrest. The agents interviewed Mehmood and his wife about their immigration status, showed them images of people they did not recognize, and asked whether they were involved in jihad. The agents, who sought information on another of Uzma's brothers, who was living in Pakistan, told Mehmood that they needed to arrest either Mehmood or his wife. They arrested Mehmood at his request. Mehmood was detained in the ADMAX SHU at the MDC.

c. *Benamar Benatta*

Benatta, an Algerian citizen and member of the Algerian Air Force, entered the United States on a visitor visa on December 31, 2000. He was granted entry in order to study aviation at Northrop Grumman, but he remained in the United States after the expiration of his visa with the goal of seeking political asylum and gaining employment. On September 5, 2001, six days before the terrorist attacks, he crossed the Canadian border using false documentation with the intent to apply for refugee status there, but was detained by Canadian authorities for investigation. On September 12, he was transported back to the United States and turned over to the INS's custody.

At the Rainbow Bridge border control post in Niagara Falls, New York, Benatta was interrogated by the FBI regarding his false documentation. A report of the interrogation was disseminated, and the INS subsequently commenced removal proceedings. Benatta was served with a Notice to Appear at immigration court in Batavia, New York, but on September 16, 2001, before the proceeding occurred and before Benatta was able to retain counsel, he was transferred to the ADMAX SHU at the MDC.

d. *Ahmed Khalifa*

Khalifa, a medical student from Egypt, was in the United States for three months on a student visa and had a return ticket to Egypt for October 15, 2001. On September 30, 2001, the apartment he shared with several other Egyptian friends was raided by FBI, NYPD, and INS agents on a tip that several Arabs living at Khalifa's address were renting out a post office box and possibly

sending out large quantities of money. The agents initially did not seem interested in Khalifa, although they asked him about his roommates, searched his wallet, and asked if he had had anything to do with the recent terrorist attacks. The agents subsequently determined that they wanted to hold Khalifa as well, and an FBI agent asked an INS agent to arrest Khalifa for working while in the United States on his student visa. Khalifa was detained in the ADMAX SHU at the MDC.

e. *Purna Raj Bajracharya*

Bajracharya, a citizen of Nepal, entered the United States in 1996 on a three-month visa. For the next five years he remained in Queens illegally, working at various odd jobs and sending money to his wife and sons in Nepal. Bajracharya intended to return to Nepal in the fall or winter 2001, and he began videotaping certain New York streets to show his family. An employee of the Queens County District Attorney's Office reported to the FBI on October 25, 2001 that an "Arab male" was videotaping a building that contained the District Attorney's office and an FBI branch office. District Attorney staff promptly detained and searched him.

During Bajracharya's initial detention and interrogation, which lasted for five hours, FBI and INS agents requested that he bring them to his apartment. He did so, and showed the agents his passport and various identification documents. He admitted that he had overstayed his visa and was illegally present in the United States, and the INS then arrested him. He was detained in the ADMAX SHU at the MDC.

f. *Ibrahim Turkmen*

Turkmen, a Muslim Imam, is a citizen of Turkey. He came to the United States on October 4, 2000 on a six-month tourist visa to visit a friend from Turkey who lived on Long Island. Shortly after his arrival, Turkmen found work at a service station in Bellport, New York. He worked there until January 2001, when he took a job at another service station in the same town. In April 2001, he left that job and began to work part-time for a local Turkish construction company. He spoke regularly to his wife and four daughters, who remained in Turkey, and sent money to support them on a weekly basis.

Turkmen spoke virtually no English when he first arrived in the United States. During his stay, he learned only the words necessary for his limited daily interaction with English-speakers. At the time that he was taken into custody, Turkmen understood very little spoken English, and he could not read English at all.

On October 13, 2001, two FBI agents visited Turkmen at the West Babylon, New York apartment where he was staying with several Turkish friends. The visit was based on a tip from the friends' landlady, who reported to an FBI hotline that she had rented her apartment to several Middle Eastern men and that she "would feel awful if her tenants were involved in terrorism and [she] didn't call." ¶ 251. The agents asked Turkmen whether he had any involvement in the 9/11 attacks and whether he had any association with terrorists. They also inquired as to his immigration status. Turkmen had difficulty understanding the questions posed to him in English by the FBI, and no interpreter was provided. Turkmen denied any involvement with terrorists or terrorist activity. The FBI agents accused Turkmen of being an associate of Osama

bin Laden and placed him under arrest. He was held at the Passaic Jail.

g. *Akhil Sachdeva*

Sachdeva is a citizen of India and is Hindu. He holds a Bachelor of Arts degree in commerce from the University of Delhi. Since 1995, he has entered the United States for extended periods of time. In December 1998, Sachdeva legally immigrated to Canada. In 1998 he married a woman who owned a gas station in Port Washington, New York. He then briefly returned to Canada until sometime in September or October of 2001, when he returned to the United States to finalize his divorce.

Sometime in late November 2001, an FBI agent visited his ex-wife's gas station looking for a Muslim employee who had been overheard having a conversation in mixed Arabic and English relating to flight simulators and flying. Failing to locate the employee, the agent left a note requesting that Sachdeva's ex-wife contact him. She passed on the request to Sachdeva, who called the agent in early December 2001. The FBI agent asked Sachdeva to come to the agent's offices for an interview, and Sachdeva complied on December 9, 2001. At the interview, two FBI agents questioned Sachdeva about the 9/11 attacks and his religious beliefs and examined his personal identification. They permitted him to leave, but on December 20, 2001, INS agents arrested Sachdeva at his uncle's apartment. He was detained at the Passaic Jail.

4. *The Claims Alleged*

The Complaint sets forth seven claims for relief. Those claims, which plaintiffs assert on their own behalf and, in most instances, on behalf of the putative class, are:

(1) a conditions of confinement claim under the Due Process Clause; (2) an equal protection claim alleging that defendants singled out plaintiffs for harsh conditions of confinement because of their race, religion and/or ethnic or national origin; (3) a claim under the Free Exercise Clause; (4) a free speech and free association claim under the First Amendment; (5) a due process claim alleging interference with access to counsel; (6) a claim under the Fourth and Fifth Amendments for unreasonable and punitive searches; and (7) a claim alleging a conspiracy among the defendants to commit the civil rights violations described in the first six claims, in violation of 42 U.S.C. § 1985.

B. *Procedural History*

The original complaint in this case was filed on April 17, 2002. The First Amended Complaint was filed on July 27, 2002. The government moved to dismiss on behalf of all named defendants on August 26, 2002, and oral argument on the motion was held on December 19, 2002. On June 2, 2003, the Office of the Inspector General of the United States Department of Justice released a 198-page report entitled "A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (the "OIG Report"). In light of the OIG Report, the plaintiffs sought leave to amend their complaint, which I granted. Around that time, the government withdrew from representing the named defendants in their individual capacities, and substitute counsel filed notices of appearance.

On June 18, 2003, the plaintiffs filed the Second Amended Complaint, attaching the April 2003 OIG Report. Supplemental briefs in support of and opposing the motions to dismiss were filed. Then, in December 2003,

the OIG filed another report—its 47-page "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (the "Supplemental OIG Report; the two OIG reports are referred to collectively as the "OIG Reports"). On September 7, 2004, plaintiffs requested leave to file a Third Amended Complaint, which I granted.

The Third Amended Complaint was filed on September 13, 2004. It raised thirty-one claims for relief that, broadly speaking, fell into two categories. The first category of claims stemmed from plaintiffs' contention that the government used plaintiffs' status as noncitizens who had violated immigration laws as an excuse to hold them in jail while it pursued its real interest: determining whether they were terrorists or could help catch terrorists. The second category of claims challenged the conditions of confinement in which the plaintiffs were held.

On June 14, 2006, after another round of briefing, I issued a memorandum and order granting in part and denying in part the motions to dismiss.[5] *Turkmen v. Ashcroft*, No. 02 Civ. 2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006) ("*Turkmen I*"). I dismissed the entire first category of claims and let the majority of claims in the

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[5] At a hearing on October 21, 2004, I ordered that discovery could begin on claims involving the conditions of confinement and the use of excessive force. The MDC Defendants moved to dismiss those claims as against them, arguing that they were entitled to qualified immunity. That motion was denied by order dated December 3, 2004, *see* ECF No. 149, and a motion for reconsideration and vacatur of the December 3, 2004 order was denied on January 14, 2005. Familiarity with that order is presumed. Insofar as the issues addressed in that order are affected by the Supreme Court's decision in *Iqbal*, 556 U.S. at 662, 129 S. Ct. 1937, I reconsider them here.

second category proceed. Remaining after the motions to dismiss were: (1) the claim that the plaintiffs held in the MDC were subject to punitive conditions of confinement in contravention of their substantive due process rights; (2) the claim that the plaintiffs held in the MDC were unreasonably strip-searched in violation of the Fourth and Fifth Amendments; (3) the claim that defendants interfered with plaintiffs' religious practices in violation of the Free Exercise Clause; (4) the claim that defendants violated plaintiffs' due process rights by assigning them to the ADMAX SHU without process of any sort; (5) the claim that the defendants singled out the plaintiffs for harsh treatment in detention because of their race, religion and/or ethnic or national origin in violation of the Equal Protection Clause; (6) the Due Process and conversion claims arising from defendants' confiscation of several plaintiffs' personal property; (7) the claim that defendants imposed a communications blackout during plaintiffs' detention in violation of plaintiffs' First Amendment and due process rights; and (8) several Federal Tort Claims Act claims and excessive force claims not relevant here.[6]

The Second Circuit ruled on the appeal of *Turkmen I* in *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) ("*Turkmen II*"). In the period between *Turkmen I* and *Turkmen II*, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *Iqbal* dramatically altered the legal landscape in two ways relevant to my decision in *Turkmen I*. First, it revolutionized federal pleading standards, discarding the traditional "no set of facts" standard estab-

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[6] Familiarity with *Turkmen I* and its underlying facts is presumed.

lished by *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), and adopting a new "plausibility" standard. *Iqbal*, 556 U.S. at 678-80, 129 S. Ct. 1937. In addition, it eliminated the doctrine of supervisory liability for *Bivens* claims. *Id.* at 676-77, 129 S. Ct. 1937. Accordingly, the Second Circuit vacated my rulings denying the motions to dismiss the conditions of confinement claims, which had applied the outdated pleading standard, and remanded the case for reconsideration of those claims. *Turkmen II*, 589 F.3d at 547.[7]

On remand after *Turkmen II*, plaintiffs sought leave to amend, which I granted on August 26, 2010. The instant complaint, entitled the Fourth Amended Complaint (the "Complaint"), was filed on September 13, 2010. The Complaint includes six claims that were originally raised in *Turkmen I* and a new claim never before raised. All defendants have moved to dismiss.

DISCUSSION

A. *The Applicable Legal Principles*

1. *The Motion to Dismiss Standard*

The pleading landscape has changed substantially since this case was first before me. Instead of holding the Complaint to the standard set by *Conley*, 355 U.S. at 45-46, 78 S. Ct. 99 (1957), under which a claim could not be dismissed unless the court concluded that there was no set of facts on which the plaintiff would be entitled to relief, following *Iqbal*, 556 U.S. at 678-80, 129 S. Ct. 1937, I must now decide whether the plaintiffs' allegations, if

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[7] The Second Circuit also addressed plaintiffs' challenge to my dismissal of several other claims, and it affirmed the dismissal of those claims.

true, state a claim that is plausible on its face. A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678, 129 S. Ct. 1937. Although the plausibility standard does not require plaintiffs to show that their desired inferences are more likely than not the correct inferences to draw, the facts alleged must establish "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that "pleads facts that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Although in considering a motion to dismiss I am required to accept as true the factual assertions in a complaint, *see Zinermon v. Burch*, 494 U.S. 113, 118, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), I am "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937 (internal quotation marks omitted). Thus, I begin my analysis of the facial plausibility of the asserted claims by identifying, and casting aside, "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679, 129 S. Ct. 1937. I then consider only the well-pleaded factual allegations in the complaint, and assuming their truth, determine whether they plausibly suggest the plaintiffs' entitlement to relief. *See id.* at 681, 129 S. Ct. 1937.

2. *Supervisory Liability After* Iqbal

Prior to the Supreme Court's decision in *Iqbal*, an official could be held liable for a constitutional tort under a

theory of "direct liability" as well as "supervisory liability." Direct liability is liability for "caus[ing] an injury while possessing the mens rea required [for a] particular constitutional [tort]." Comment, *Supervisory Liability After* Iqbal: *Decoupling* Bivens *from Section 1983*, 77 U. Chi. L. Rev. 1401, 1408 (2010). In other words, an individual becomes directly liable for a constitutional tort (he becomes a "primary actor") when he acts in a way that satisfies each of the elements of that tort. For example, a defendant is directly liable for an equal protection violation if he (1) injures a plaintiff (causation) (2) because of discriminatory animus (mens rea). And if a defendant's (1) deliberately indifferent failure to act in the face of a known risk to an inmate's safety (mens rea) (2) causes injury to that inmate (causation), the defendant will be liable for an Eighth Amendment violation. As is evident, the elements that must be satisfied for a defendant to be held directly liable for a tort depend on the tort alleged.

In contrast, supervisory liability is incurred when a supervisory defendant (a "secondary actor") is in some way "personally involved" with a primary actor's constitutional tort and is a cause of the plaintiff's injury. In the Second Circuit, personal involvement is understood broadly. A government official is personally involved in a constitutional tort if he: (1) participated directly in the alleged violation; (2) failed to remedy the violation after being informed of the violation through a report or appeal; (3) created a policy or custom, or allowed the continuance of such a policy or custom, under which unconstitutional practice occurred; (4) was grossly negligent in supervising a subordinate who committed the unlawful act; or (5) exhibited deliberate indifference to an individual's constitutional rights by failing to act on information indicating the unconstitutional act was occurring. *Colon*

v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (citing *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994)).

For supervisory liability to exist, the secondary actor's behavior need not satisfy each of the elements of the constitutional tort. Rather, as long as a primary actor committed a constitutional tort and the secondary actor was personally involved in that tort (in any of the five ways set forth in *Colon*) and was a cause of the plaintiff's injury, the secondary actor may be held liable. The elements necessary to incur supervisory liability do not vary with the constitutional tort alleged. Thus, the conduct of a secondary actor sued for supervisory liability will be judged under the same standard for personal involvement, regardless of whether the primary actor's tort arises under the Equal Protection Clause or the Fourth Amendment.

Supervisory liability, therefore, extends liability to persons who cannot be held directly liable. While direct liability exists only when all the elements of the tort in question have been established, supervisory liability can operate to relax a mens rea element, allowing liability against a supervisory defendant who does not satisfy that element of the tort. For example, a supervisor who lacked discriminatory intent can never be held directly liable for an equal protection violation, but if he "was grossly negligent in supervising a subordinate" who committed an equal protection violation, he may be held liable on a theory of supervisory liability. Rather than act with the intent to discriminate, the supervisory defendant need only have been negligent in the discharge of his supervisory responsibilities.

Supervisory liability does not, however, relax all of the elements of a constitutional tort. One common element

of any recognized constitutional tort is that the defendant caused the plaintiff's injury. Supervisory liability does not dispense with the need to show an affirmative causal link between the supervisor's actions (or inactions) and the injury. *See, e.g., Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002) (holding that § 1983's causation requirement applies when invoking supervisory liability); *Iqbal*, 556 U.S. at 675, 129 S. Ct. 1937 ("In the limited settings where *Bivens* does apply, the implied cause of action is the 'federal analog to suits brought against state officials under [§ 1983].'") (quoting *Hartman v. Moore*, 547 U.S. 250, 254 n.2, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006)). In other words, regardless of whether a defendant is sued under a theory of direct or supervisory liability, he must have caused the plaintiff's injury.

In *Iqbal*, the Supreme Court, in no uncertain terms, eliminated supervisory liability in *Bivens* claims. *Iqbal*, 556 U.S. at 676-77, 129 S. Ct. 1937. According to the Court, "where masters do not answer for the torts of their servants[,] the term 'supervisory liability' is a misnomer." *Id.* at 677, 129 S. Ct. 1937. Thus, after *Iqbal*, in order for a plaintiff to assert a valid *Bivens* claim against a government official, he "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676, 129 S. Ct. 1937. In other words, only direct liability remains for *Bivens* claims.

This is not to say that supervisors are now immune from *Bivens* actions. A supervisor, just as any defendant, can be held directly liable for a constitutional tort if his actions satisfy the elements of that tort. However, if a supervisor cannot be held directly liable for a constitutional tort, that is, if his conduct has not satisfied the

elements of that tort, the doctrine of supervisory liability is now unavailable to relax those elements.

Nor does the elimination of supervisory liability spell the end of *Bivens* liability premised upon a defendant's inaction if such inaction satisfies the elements of a tort. As *Colon* makes clear, nonfeasance—just like malfeasance—*can* be a basis for liability, and nothing in *Iqbal* changed this rule. *D'Olimpio v. Crisafi*, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010) ("*Colon's* bases for liability are not founded on a theory of *respondeat superior*, but rather on a recognition that 'personal involvement of defendants in alleged constitutional deprivations' can be shown by nonfeasance as well as misfeasance.'" (quoting *Colon*, 58 F.3d at 873)); *see, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (premising liability upon failure to protect from privately inflicted harms); *cf. City of Okla. City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) (premising § 1983 liability of municipality upon failure to train its employees).

The defendants argue that, of the five forms of personal involvement described by *Colon*, only the first and the first half of the third survive *Iqbal*. The Second Circuit has never addressed this precise issue, and the district courts in this Circuit, as well as the other courts of appeals, have grappled with this question and reached conflicting results. *Compare Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801, 2009 WL 1835939, at *5-6 (S.D.N.Y. June 26, 2009) (dismissing deliberate indifference claim against a supervisor, holding that *Iqbal* abrogated categories of supervisory liability that do not involve "active conduct"), *with D'Olimpio*, 718 F. Supp. 2d at 347 (holding that each of the five *Colon* categories for personal liability of supervisors may still apply as long as

they are consistent with the elements of particular constitutional tort alleged); *see also Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) *superseding*, 633 F.3d 1191 (9th Cir. 2011), *rehearing en banc denied*, 659 F.3d 850 (9th Cir. 2011) (holding that plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates)[8]; *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 72 (3d Cir. 2011) (assuming, without holding, that a federal supervisory official may be liable in certain circumstances even though he or she did not directly participate in the underlying unconstitutional conduct); *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 n.8 (3d Cir. 2010) (noting that *Iqbal* may restrict the incidents in which a "failure to supervise" will result in liability, but refraining from deciding the question); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (holding a defendant-supervisor can be held liable if he "creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy" that causes a constitutional tort).

I don't find this debate over what "remains" of the *Colon* standards for personal involvement after *Iqbal* to be useful. *Iqbal* removed supervisory liability from *Bivens* claims. This means that liability can no longer be shown by alleging *simply* personal involvement under *Colon* (and causation of the plaintiff's injury) *regardless*

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[8] Dissenting from denial of rehearing en banc, Judge O'Scannlain, joined by seven judges, argued that the majority opinion "conflicts with *Iqbal* in . . . its far-reaching conclusions regarding supervisory liability." *Starr v. Cnty. of Los Angeles*, 659 F.3d 850, 855 (9th Cir. 2011).

of the kind of constitutional tort alleged. Direct liability is now the only option in *Bivens* claims—for supervisors and supervisees—and a plaintiff must now allege that the defendant's conduct satisfies each of the elements of the tort alleged. But the demise of supervisory liability in *Bivens* claims does not mean that the forms of personal involvement under *Colon* can never constitute a basis for *direct* liability. If a defendant's personal involvement under *Colon* satisfies the elements of a constitutional tort, that involvement may trigger liability.

For example, because the mens rea element of an Eighth Amendment violation is deliberate indifference, a supervisor—like any other defendant—can be held directly liable for deliberate indifference (the fifth form of personal involvement set forth in *Colon*), assuming his conduct meets the other elements of the tort. And, as *Iqbal* itself discussed, because the mens rea element of an equal protection claim is discriminatory intent, "purpose rather than knowledge is required to impose *Bivens* [direct] liability on [a] subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." *Iqbal*, 556 U.S. at 677, 129 S. Ct. 1937. Accordingly, if a supervisor, for example, created a policy or custom directing unconstitutional conduct (the third form of personal involvement set forth in *Colon*) because of discriminatory animus, and that policy or custom caused plaintiff's injury, a supervisor may be held liable for that conduct. What is different after *Iqbal* is that the guiding question is no longer simply whether a plaintiff has pleaded personal involvement under *Colon* but whether a plaintiff has pleaded each of the elements of the constitutional tort alleged. The "factors necessary to establish a *Bivens* violation will vary with the constitu-

tional provision at issue," *id.* at 676, 129 S. Ct. 1937, and what "remains" of *Colon* depends on the constitutional provision at issue.

3. *The Qualified Immunity Standard*

Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In determining whether a right was clearly established, courts look to whether (1) the right was defined with reasonable clarity; (2) Supreme Court or Second Circuit precedent has confirmed the existence of the right; and (3) a reasonable defendant would have understood from the existing law that his conduct was unlawful. *Young v. Cnty. of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998). The determination of whether the right at issue was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *abrogated on other grounds by Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). An officer is entitled to qualified immunity even when his actions were unlawful provided the constitutionality of his conduct was objectively debatable. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Taravella v. Town of Wolcott*, 599 F.3d 129, 135 (2d Cir. 2010) (holding that "consideration of whether it was 'objectively reasonable' for a defendant to believe his actions were lawful . . . is indispensable" to the qualified immunity analysis); *Danahy v. Buscaglia*, 134 F.3d 1185, 1190 (2d Cir. 1998) (stating that immunity

applies whenever "officers of reasonable competence could disagree on the legality of defendant's actions") (internal quotation marks omitted).

There was a time when the qualified immunity analysis had a prescribed order of operations: judges were directed to first decide whether the defendant's conduct (as alleged by the plaintiff) violated a constitutional right; and only if the answer to that question was "yes" could they proceed to determine whether the right was "clearly established" at the time of the violation. *Saucier*, 533 U.S. at 201, 121 S. Ct. 2151 (emphasis added). However, following the Supreme Court's decision in *Pearson*, 555 U.S at 242, 129 S. Ct. 808, courts now have discretion to address those questions in reverse order, and to refrain from deciding the first if the asserted right was not clearly established. *See Doninger v. Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011).

B. *Claims One and Six: Conditions of Confinement*

The MDC Detainees allege that the creation and the implementation of the harsh confinement policy violated their Fifth Amendment substantive due process rights. They assert Claim One against all defendants; Claim Six asserts a Fifth Amendment due process claim against only the MDC Defendants based on the strip searches.[9] Both are *Bivens* claims seeking damages.[10]

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[9] Although Claim Six focuses solely on the strip searches and does not name the DOJ Defendants, the factual allegations incorporated by reference into Claim One embrace the strip search allegations. I deem Claim One to allege, *inter alia*, strip searches in violation of the Fifth Amendment against the DOJ Defendants.

[10] Although, as discussed more fully below in relation to the free exercise-based *Bivens* claim, "the Supreme Court has warned that

1. *The Elements of the Claim*

I consider plaintiffs' substantive due process claim under the standard applicable to pretrial detainees. *See Turkmen I*, 2006 WL 1662663, at *31-32, *aff'd in part, vacated in part, remanded*, 589 F.3d 542 (2d Cir. 2009). For pretrial detainees, such a claim is governed by the Due Process Clause of the Fifth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). In an action challenging conditions or restrictions of pretrial detention he has *purposefully* im-

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the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in 'new contexts'," *Arar v. Ashcroft*, 585 F.3d 559, 582 (2d Cir. 2009) (en banc) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)). The conditions-of-confinement claims do not present a new context. The Second Circuit has long assumed that mistreatment claims like those alleged here give rise to a *Bivens* claim. *See Arar*, 585 F.3d at 597 (Sack, J., dissenting) (citing cases). Moreover, as Judge Sack pointed out in dissent in *Arar*, when the Second Circuit reviewed essentially identical claims in *Iqbal*, it "did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of the *Bivens* doctrine." *Id.* Indeed, even the en banc majority in *Arar*, which concluded that extraordinary rendition was a new context (into which the *Bivens* remedy would not be extended), acknowledged that *Bivens* claims are already available for the harsh conditions of confinement alleged here. *See id.* at 580 ("In the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued. The guard who beat a prisoner should not have beaten him; . . . and the immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes."). Moreover, in *Turkmen I*, I rejected defendants' arguments that a *Bivens* remedy should not be extended, and I see no reason to revisit that determination here. 2006 WL 1662663, at *29.

posed, a *Bivens* defendant may be held liable if (1) with the intent to punish (mens rea) (2) he engaged in conduct that caused the conditions or restrictions that injured the plaintiff (causation). *Id.* at 535, 99 S. Ct. 1861; *Iqbal v. Hasty*, 490 F.3d 143, 169 (2d Cir. 2007), *rev'd by Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). If the plaintiff does not allege that the defendant verbally expressed an intent to punish, punitive intent may be inferred from the nature of the conditions or restraints allegedly imposed. Specifically, a court may consider "'whether an alternative purpose to which [the condition] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Wolfish*, 441 U.S. at 538, 99 S. Ct. 1861 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539, 99 S. Ct. 1861. In contrast, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.*

With respect to conditions of pretrial detention not alleged to be *purposefully* caused by the defendants, which I refer to as environmental conditions, a *Bivens* defendant may be held liable on a substantive due process claim if he (1) caused injury to the plaintiff through his (2) deliberate indifference to a substantial risk that the plaintiff would be deprived of a basic human need, such as food, clothing, shelter, medical care, sleep, and reasonable safety. *See*

Iqbal, 490 F.3d at 169; *Caiozzo v. Koreman*, 581 F.3d 63, 69 (2d Cir. 2009); *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs.*, 489 U.S. 189, 200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). A defendant who is deliberately indifferent to a risk must be subjectively aware of that risk. *Caiozzo*, 581 F.3d at 71.

2. *The Sufficiency of the Allegations*

The plaintiffs allege that the defendants violated their substantive due process rights. Specifically, they complain that the defendants caused them to be, *inter alia*, constructively denied the opportunity to exercise; denied sleep; repeatedly placed in handcuffs and shackles; deprived of hygienic implements, such as soap and toilet paper; subjected to extremely cold conditions; deprived of sufficient food; frequently verbally and physically abused; and repeatedly strip-searched (collectively, the "challenged conditions").

The plaintiffs advance different theories of liability with respect to the DOJ defendants and the MDC defendants. They seek to hold the MDC defendants liable for creating, or being deliberately indifferent to, the challenged conditions. In contrast, they seek to hold the DOJ defendants liable for creating the harsh confinement policy, which directed that the Detainees be held in restrictive conditions such that they felt maximum pressure to cooperate with law enforcement. Although that policy did not expressly contemplate the specific challenged conditions, plaintiffs allege that it *caused* those conditions because the challenged conditions were created in the implementation of the harsh confinement policy.

Consistent with my ruling in *Turkmen I*, 2006 WL 1662663, at *32-33, the defendants do not contest that the purpose of the challenged conditions was to punish and/or that the challenged conditions presented a serious risk of depriving the Detainees of their basic human needs.[11] Instead, the defendants, citing different rationales, argue that they should not be held responsible for injuries caused by those conditions. In other words, at issue on these motions to dismiss is not whether *someone* may be held liable in a *Bivens* action for the challenged conditions; it is whether each defendant is a proper defendant in such an action.

a. *The DOJ Defendants*

Plaintiffs contend that the DOJ defendants should be held liable because (1) with the intent to punish the Detainees (2) they created the harsh confinement policy, which caused the challenged conditions that injured the Detainees. The DOJ defendants contend that, because the policy did not itself direct unconstitutional action, it cannot be the basis for imposing liability now that supervisory liability has been eliminated. In other words, these defendants argue that to hold them liable simply because their facially constitutional policy was unconstitutionally applied would be to hold them responsible not for their own acts but for the acts of their supervisees.

I agree that holding the DOJ defendants liable *solely* on the basis that the MDC defendants unconstitutionally applied their facially constitutional policy would be the equivalent of imposing *respondeat superior* liability—a form of supervisory liability discarded in *Iqbal*. Indeed,

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[11] Accordingly, I do not revisit the question of whether the challenged conditions evince an intent to punish.

one could describe almost *any* act taken by the MDC defendants as having been caused by the DOJ defendants, and holding the latter responsible for the former's acts without more than but-for causation would make a master responsible for the acts of his servants. *Cf. City of Okla. City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) ("Obviously if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, [a city police officer] would never have killed [the plaintiff] if [the city] did not have a 'policy' of establishing a police force."); *Connick v. Thompson*, — U.S. —, 131 S. Ct. 1350, 1365, 179 L. Ed. 2d 417 (2011) (finding that a "stringent standard of fault" is necessary to connect a municipal policy with municipal employees' unconstitutional acts "lest municipal liability under § 1983 collapse into *respondeat superior*.").

However, a substantive due process violation requires more than simply but-for causation. It also requires an intent to punish, and when punitive intent motivates a facially constitutional policy that is implemented by the creation of unconstitutionally punitive conditions of confinement, imposing liability upon the policymaker is very different from imposing *respondeat superior* liability. *Cf. Brock v. Wright*, 315 F.3d 158, 167 (2d Cir. 2003) (permitting liability where unconstitutional acts were taken in implementation of policy that was ambiguous on its face but was interpreted and intended by the policymaker to call for those acts). A facially constitutional policy that was expressly intended to cause the kind of constitutional violation it ultimately caused constitutes behavior upon which *direct* liability may properly be premised.

I conclude that plaintiffs have failed to state a claim that the DOJ defendants violated their substantive due process rights because the Complaint does not plausibly plead that the DOJ defendants possessed punitive intent. Although an inference of punitive intent may be drawn from the conditions themselves, in evaluating the sufficiency of the allegations against the DOJ defendants it is useful to bear in mind what the plaintiffs do *not* allege. They do not allege that the DOJ defendants intended that the MDC defendants create the punitive and abusive conditions in which the plaintiffs were detained. Nor do they allege that the DOJ defendants were even aware of those conditions. Rather, they simply contend that the unconstitutional conditions of confinement were the "direct result" of the DOJ defendants' harsh confinement policy, and particularly of their directive to "exert maximum pressure on" the detainees, who "needed to be encouraged in any way possible to cooperate." ¶ 61. Plaintiffs' counsel contended at oral argument that those marching orders "encourage[d] illegal means" of obtaining detainee cooperation, which in fact were used, and that encouragement supports an inference at this stage that these defendants intended the resulting detainee abuse. Oral Arg. Tr. 41, ECF No. 759. In effect, and plaintiffs' counsel conceded as much at oral argument, plaintiffs would have me infer from the DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully* that they intended to punish the plaintiffs. This I cannot reasonably do.

"Generally, a supervisory official is entitled to assume that subordinates will pursue their responsibilities in a constitutional manner." *Smiley by Smiley v. Westby*, No. 87 Civ. 6047, 1994 WL 519973, at *8 (S.D.N.Y. Sept. 22, 1994); *cf. Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060,

1065-66 (2d Cir. 1989) (defendant could not be held liable for delegating power to supervisee who acted unconstitutionally in exercising that power because defendant could rely on supervisee to adhere to the Constitution). The DOJ defendants were entitled to expect that their subordinates would implement their directions lawfully, and I cannot reasonably infer that the failure to make that expectation explicit suggests punitive intent. Accordingly, I grant the motion to dismiss plaintiffs' conditions-of-confinement claims with respect to these defendants.

b. *The MDC Defendants*

The plaintiffs seek to hold the MDC defendants responsible for the challenged conditions, some of which were created as a matter of express policy (*e.g.*, regular handcuffing and shackling, deprivation of hygienic implements, strip-searches, constructive denial of exercise) and others of which were not (*e.g.*, verbal and physical abuse, sleep deprivation). I refer to the former group of conditions as the "official conditions" and the latter group as the "unofficial abuse." With respect to the official conditions, the plaintiffs argue that the MDC defendants (1) created the challenged conditions (2) with the intent to punish. With respect to the unofficial abuse, the plaintiffs contend that all the MDC defendants except Zenk[12]

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[12] Plaintiffs "do not seek to hold Defendant Zenk responsible for the abuses that occurred [i]n the AMDAX [SITU] beyond those imposed as a matter of policy." Pls.' Mem. Opp. Mot. to Dismiss 41 n.15, ECF No. 749. In addition, plaintiffs do not assert against Zenk any claims arising from activities prior to April 22, 2002, the date he became Warden of the MDC.

(1) caused plaintiffs' injuries through (2) their deliberate indifference to the risk that such abuse would occur.[13]

The Complaint states a plausible claim against all of the MDC defendants for the official conditions. The

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[13] The archetypal substantive due process claim for environmental conditions is a claim against prison officials for failing to protect the plaintiff against *privately* inflicted harms. As the Supreme Court has explained, government actors do not generally have a duty to protect persons from private harms, but when the government takes a citizen into its care, such a "duty to assume some responsibility for his safety and general wellbeing" arises. *DeShaney*, 489 U.S. at 200, 109 S. Ct. 998. The "rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.* Accordingly, when a government official is deliberately indifferent to known risks to a prisoner's basic human needs and yet fails to discharge his duty to protect, he may be held liable under the Substantive Due Process Clause. *See Wolfish*, 441 U.S. at 535-36, 99 S. Ct. 1861. In this case, plaintiffs allege that the MDC defendants failed to protect them from harms inflicted by their subordinates—*i.e.*, not private individuals but government employees under their supervision. The logic of *DeShaney* and *Wolfish* applies with just as much force to this kind of claim. Thus, because a government official may be held liable for his inaction when he is deliberately indifferent to the known risk of private harms to a prisoner, he may be held liable when he is deliberately indifferent to a known risk of harm at the hands of his own subordinates. This is not supervisory liability or even liability that arises from the discharge of supervisory responsibilities. The same theory of liability applies identically to supervisors and subordinates alike: When an officer is deliberately indifferent to a known risk of any threat (public *or* private) to a prisoner's basic human needs and fails to act to mitigate that risk, he may be liable.

plaintiffs allege that Hasty ordered the creation of the ADMAX SHU and ordered two of his subordinates, Lopresti and Cuciti, to design extremely restrictive conditions of confinement for those assigned to it; that Cuciti and Lopresti created the written policy setting forth the official conditions; that Hasty and Sherman then approved and implemented that written policy; and that, when Zenk replaced Hasty, he approved and implemented the conditions created under Hasty's watch. These allegations establish that each defendant was a cause of the official conditions, and the conditions themselves permit an inference of punitive intent with respect to every defendant because every defendant had a hand in creating or implementing them. *See Wolfish*, 441 U.S. at 538-39, 99 S. Ct. 1861.

The plaintiffs have also stated a claim against all of the MDC defendants for the unofficial abuse. No one questions that the abuse constituted a grave risk to plaintiffs' reasonable safety, and the Complaint plausibly alleges that all of the defendants were deliberately indifferent to—that is, subjectively aware of—that risk and yet did nothing to mitigate it. Indeed, plaintiffs allege that Hasty "was made aware of the abuse that occurred through inmate complaints, staff complaints, hunger strikes, and suicide attempts," ¶ 24; Zenk and Sherman made rounds in the ADMAX SHU and were aware of the abusive conditions there; Lopresti was frequently present in the ADMAX SHU, regularly reviewed documentation of some of the abuses, and received numerous complaints from the Detainees about abuse and mistreatment; Cuciti made rounds in the ADMAX SHU, reviewed logs created by the unit, and heard complaints from the Detainees about the unofficial abuse; and all of the MDC defendants failed to take steps to rectify the abuse. These specific

factual allegations suffice to raise the reasonable inference that the MDC defendants had the requisite mens rea and that their inaction in the face of the unofficial abuse caused plaintiffs' injuries.

3. *Qualified Immunity*

The defendants are not entitled to qualified immunity. It was clearly established in 2001 that punitive conditions of confinement could not be imposed upon unconvicted detainees. *Iqbal*, 490 F.3d at 169; *Turkmen I*, 2006 WL 1662663, at *34. *See Bell*, 441 U.S. at 538, 99 S. Ct. 1861; *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). The unique context of the 9/11 attacks did not render the law unclear. As the Second Circuit has observed, the "right not to be subjected to needlessly harsh conditions of confinement" does "not vary with surrounding circumstances." *Iqbal*, 490 F.3d at 159. This right was among those that were "clearly established prior to 9/11, and [it] remained clearly established even in the aftermath of that horrific event." *Id.* at 160.

The MDC defendants argue that even if the law was clearly established, they should be granted qualified immunity because, in holding the plaintiffs in the ADMAX SHU, they were following the facially valid orders of their superiors at the BOP. Specifically, they suggest that their BOP superiors designated the plaintiffs for restrictive confinement, and that they were entitled to assume that their BOP superiors did so because they suspected the plaintiffs of links to terrorism. Therefore, they contend, reasonable officers in their position would not have known that their behavior violated clearly established law. But this argument conflicts with the express allegations in

the Complaint[14] that the harsh confinement policy was facially discriminatory and that the MDC defendants were informed that law enforcement had no information linking the plaintiffs to terrorism. Accordingly, I find the argument without merit and deny qualified immunity.

C. *Claim Two: Equal Protection Claims*

Plaintiffs bring a *Bivens* claim for violation of their equal protection rights under the Due Process Clause of the Fifth Amendment.[15] They contend that defendants created and implemented the harsh confinement policy because of their race, religion, and national origin. Specifically, plaintiffs assert that the harsh confinement policy was facially discriminatory, as it was expressly directed at Muslim and Arab men.[16]

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[14] The defendants contend that the plaintiffs cannot partially incorporate the OIG Reports, i.e., that they must incorporate them wholesale rather than only to the extent they do not conflict with the allegations of the Complaint. I reject this suggestion. There is a difference between disputing the words that appear in an incurporated document (impermissible) and disputing the truth of those words (permissible). Although plaintiffs could not incorporate the OIG Reports and then allege that they do not say what they plainly say, they need not incorporate all of the allegations in the Reports for their truth. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010).

[15] The availability of a *Bivens* remedy for violations of the Equal Protection Clause has been conclusively established. *See Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

[16] Because the Passaic plaintiffs were not injured by the alleged discrimination—they were held in the general population of the Passaic Jail and thus cannot claim that they were held in harsher conditions than they would have been held if not for their race, religion, and/or national origin—I dismiss their equal protection claims.

1. *The Elements of the Claim*

To prevail at this stage on their equal protection claim, plaintiffs must plausibly allege that defendants' (1) discriminatory animus (2) caused plaintiffs' injuries. *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999); *cf. Hartman v. Moore*, 547 U.S. 250, 259-61, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006) (explaining, in the context of First Amendment retaliatory discharge claims, that discriminatory animus is insufficient if the complained-of adverse action would have occurred anyway). They may plead discriminatory animus in any of three ways. First, they may plead that defendants adopted or implemented a policy that classifies on the basis of race, religion, or national origin. A "policy is discriminatory on its face if it expressly classifies persons" on the basis of such an unlawful characteristic. *Hayden*, 180 F.3d at 48. Second, they may plead that a facially neutral policy was applied to them in an intentionally discriminatory fashion. *Id.* Third, they may plead that a facially neutral policy was motivated by discriminatory animus and its application resulted in a discriminatory effect. *Id.*

Plaintiffs follow the first route, contending that the harsh confinement policy, which the DOJ defendants created, expressly dictated that Arab and Muslim noncitizens should be detained in restrictive conditions. Oral Arg. Tr. 59-61, ECF No. 759. They allege that the MDC defendants then implemented that facially discriminatory policy by placing Muslim and Arab noncitizens in the ADMAX SHU because of their race, religion, and/or national origin, causing injury to plaintiffs. Accordingly, plaintiffs must plausibly allege that the DOJ defendants

adopted and the MDC defendants implemented such a facially discriminatory policy, which injured the plaintiffs.

2. *The Sufficiency of the Allegations*

The Complaint alleges that Ashcroft, Mueller, and Ziglar created, and Hasty, Zenk, Sherman, Lopresti, and Cuciti implemented, the detention policy, which was expressly directed at Arab and Muslim men.[17] Although only the harsh confinement policy is challenged here, the Complaint alleges that each piece of the detention policy —including the initial arrest, "of interest" treatment, and application of the hold-until-cleared policy—overtly targeted Arab and Muslim individuals. Such allegations "can provide the framework of a complaint, [but] they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679, 129 S. Ct. 1937. And after careful review of the Complaint, taking due note of the Supreme Court's analysis in *Iqbal*, I conclude that the facts alleged adequately support the plaintiffs' claims against the MDC defendants, but not against the DOJ defendants.

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[17] *See, e.g.*, ¶ 7 ("Plaintiffs' and class members' race, religion, ethnicity, and national origin played a decisive role in Defendants' decision to detain them initially and to subject them to punitive and dangerous conditions of confinement. . . . "); ¶ 282 ("In subjecting Plaintiffs and class members to harsh treatment not accorded similarly-situated non-citizens, Defendants . . . singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin. . . . "); ¶ 48 ("Ashcroft, Mueller, and Ziglar's decision to hold [the Detainees] for criminal investigation without evidence of any ties to terrorism was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant information about them.").

a. *The DOJ Defendants*

The Complaint fails to allege facts sufficient to raise a reasonable inference that Ashcroft, Mueller and Ziglar created the alleged harsh confinement policy. To be sure, there are ample allegations that these defendants—particularly Ashcroft and Mueller—classified persons on the basis of race, religion and national origin for purposes of arrest and detention. *See, e.g.*, ¶¶ 40, 41, 43, 44. But those alleged actions do not constitute equal protection violations standing alone. For example, Ashcroft's direction to arrest all male immigration violators between the ages of 18 and 40 from a Middle Eastern country did not, in light of the executive branch's plenary power over immigration, amount to an equal protection violation. *See Turkmen I*, 2006 WL 1662663, at *41-43; *Turkmen II*, 589 F.3d at 550. I have considered whether the discriminatory animus suggested by that direction and the other allegations—regardless of whether they are actionable in themselves—may properly be relied on to suggest animus on the part of Ashcroft, Mueller, and Ziglar with respect to the sole equal protection violation alleged, *i.e.*, the facially discriminatory harsh confinement policy. But there is a critical distinction between a decision to round up violators of the immigration laws and a decision to treat them harshly once they are in federal custody. There is no "equal protection right to be free of selective enforcement of the immigration laws based on national origin, race or religion." *Turkmen II*, 589 F.3d at 542. Because of the broad powers of the political branches in the areas of immigration and naturalization, in that one setting discrimination on grounds of race, religion and national origin is not invidious. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999). There is indeed

an equal protection right to be free of excessively harsh conditions of confinement on those bases, but I am reluctant to allow allegations of lawful conduct to support an inference that the DOJ Defendants created the facially discriminatory confinement policy alleged here.

Plaintiffs' allegations fall short of raising a reasonable inference that Ashcroft, Mueller, and Ziglar created the alleged overtly discriminatory harsh confinement policy. For example, the allegation that the head of the New York FBI field office thought that national origin and religion were relevant to the PENTTBOM investigation requires inference upon inference—that the office head thought these traits were relevant because of Ashcroft, Mueller, or Ziglar's orders and that discrimination with respect to the PENTTBOM investigation translated into discrimination with respect to conditions of confinement—and those inferences are very weakly suggested. Similarly, that Ashcroft, Mueller, and Ziglar were aware that Arab and Muslim noncitizens encountered during the PENTTBOM investigation were, without individualized assessment, automatically treated as "of interest" potentially raises an inference these defendants harbored discriminatory animus. However, because the same allegation is also consistent with a policy to treat everyone encountered during the PENTTBOM investigation as "of interest," this allegation standing alone would be insufficient to render the plaintiffs' equal protection claim plausible.

In making this determination, I acknowledge that the factual allegations before me now are distinguishable from those alleged in *Iqbal*, where the Supreme Court determined that the plaintiffs failed to state a plausible claim. 556 U.S. at 683, 129 S. Ct. 1937. In *Iqbal*, the plaintiffs alleged that Ashcroft and Mueller designated

them as of high interest to the PENTTBOM investigation and held them in the ADMAX SHU because of discriminatory animus. *Id.* at 668-69, 129 S. Ct. 1937. However, the only relevant factual allegations plaintiffs made at the time were (1) that Ashcroft and Mueller approved of holding "of high interest" detainees in harsh conditions of confinement until they were cleared of suspicion and (2) that thousands of Arab and Muslim individuals were held in harsh conditions of confinement. *Id.* at 681, 129 S. Ct. 1937. The Court concluded that the former allegation plausibly suggested only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683, 129 S. Ct. 1937. And it found that the latter allegation, although consistent with discriminatory animus, was not suggestive of such animus because "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682, 129 S. Ct. 1937.

Now, however, the plaintiffs have amplified their claim with more factual allegations. For example, the Complaint alleges that Ashcroft, Mueller, and Ziglar knew that law enforcement lacked any information tying the Detainees to terrorism, suggesting that the harsh confinement policy was not simply about keeping suspected terrorists in secure conditions. And plaintiffs allege that the few individuals initially detained in harsh conditions who were not Arab or Muslim were cleared quickly or moved into the general population without clearance,

demonstrating that at least some non-Arab and non-Muslim individuals were treated differently than the MDC Detainees. I find the issue to be a close one, but after applying the *Iqbal* pleading standard I conclude that these allegations, viewed together with all the allegations in the Complaint, do not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion or national origin.

b. *The MDC Defendants*

With respect to Hasty, Zenk, Sherman, Lopresti, and Cuciti, I conclude that the Complaint raises the reasonable inference that they effectuated the harsh confinement policy and held the Detainees in restrictive conditions of confinement because of their race, religion, and/or national origin. In so determining, I rely upon the allegations set forth above, as well as the allegations that:

- Hasty, Zenk, Sherman, Lopresti, and Cuciti created the harsh conditions at the ADMAX SHU and either personally witnessed or received complaints about how the MDC Detainees were treated there. ¶¶ 24-28.
- The Detainees were placed in the ADMAX SHU without hearings or individualized determinations of dangerousness. ¶¶ 68-74.
- Lopresti signed a document that was prepared by Cuciti, and approved by Hasty and Sherman, which untruthfully stated that the executive staff at MDC had classified the "suspected terrorists" as "High Security" based on an individualized assessment of their "precipitating offense, past ter-

rorist behavior, and inability to adapt to incarceration." ¶ 74.

- Hasty, Sherman, and Lopresti continued to hold the MDC Detainees in the ADMAX SHU even after learning that the FBI had not developed any information to tie them to terrorism. ¶ 69.
- Staff verbally abused the MDC Detainees by, for example, referring to them as terrorists, insulting their religion, and referring to them as camels. ¶¶ 109-10. Hasty too referred to the Detainees as terrorists. ¶¶ 77, 109.
- Staff refused the MDC Detainees' requests to keep the Koran in their cells, to be provided with Halal food, to be told the time of day so they could pray at proper times, and to be told the date so that they could acknowledge Ramadan. ¶ 132-34. They also frequently interrupted the MDC Detainees' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping them, and telling them to "shut the fuck up," among other things. ¶ 136.

In light of these factual allegations, and because there is no reasonable dispute that the MDC defendants' conduct caused plaintiffs' injuries, I conclude that the Complaint pleads a plausible equal protection claim against the MDC defendants.

3. *Qualified Immunity*

Qualified immunity is unavailable to any of the MDC defendants. It was clearly established in 2001 that creating and implementing a policy expressly singling out Arabs and Muslims for harsh conditions of confinement violates their Fifth Amendment equal protection rights.

See Iqbal, 490 F3d at 174 ("The Plaintiff also alleges that 'Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin.' These allegations are sufficient to state a claim of animus-based discrimination that any 'reasonably competent officer' would understand to have been illegal under prior case law." (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)); *Hayden*, 180 F3d at 48 (stating that racial classifications violate the Equal Protection Clause where motivated by racial animus and having a discriminatory effect)). In addition, insofar as the MDC defendants seek qualified immunity on the theory that they were following facially valid orders, this gets them nowhere; the Complaint alleges that the harsh confinement policy was facially discriminatory, not facially valid. The defendants are not entitled to qualified immunity on plaintiffs' equal protection claim.

D. *Claims Four and Five: Interference with Communications*

The MDC plaintiffs allege that Ashcroft, Mueller, and Ziglar created an explicit policy to limit MDC Plaintiffs' and class members' access to the outside world and that the MDC Defendants implemented that policy in violation of the First Amendment and Fifth Amendment substantive due process rights ("communications claims").[18] ¶¶ 288-96; Pls.' Mem. Opp. Mot. to Dismiss

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[18] The Complaint also appears to raise a due process claim for defendants' alleged interference with their right to access the courts. ¶ 294. As plaintiffs' counsel conceded at oral argument, *see* Oral Arg. Tr. at 56, I dismissed that claim in *Turkmen I*, 2006 WL 1662663, at *48-49, and I see no reason to revisit that decision. To the extent plaintiffs press a claim with respect to their right of access to the courts, it is dismissed.

69, ECF No. 749. These communications restrictions are alleged to have taken multiple forms: (1) an express policy to hold them incommunicado until mid-October 2001 despite the lack of any basis to believe they had any link to terrorism; (2) the MDC guards effectively denied them one-legal call per week and one social visit per month after the complete communications blackout was lifted; and (3) the MDC defendants permitted the video and audiotaping of the detainees' visits with their attorneys, including the use of sound recording.

1. *Qualified Immunity*

When qualified immunity is raised in a motion to dismiss, court must determine (1) whether the alleged facts demonstrate that a defendant violated a constitutional right; and, if yes, (2) whether this constitutional right was clearly established at the time of the challenged action. *Saucier*, 533 U.S. at 201, 121 S. Ct. 2151. As discussed above, following the Supreme Court's decision in *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), courts have discretion to elect which prong of the qualified immunity inquiry to consider first. *See Pearson*, 555 U.S. at 236, 129 S. Ct. 808 ("The judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). When a court grants immunity at step two of the qualified-immunity analysis, it is within its discretion to decline to address the constitutionality of the defendants' conduct. *Pearson* identified a number of factors that might influence a court to exercise its discretion not to reach the constitutional question: (1) the constitutional violation question "is so factbound that the decision

provides little guidance for future cases"; (2) "it appears that the question will soon be decided by a higher court"; (3) deciding the constitutional question requires "an uncertain interpretation of state law"; (4) "qualified immunity is asserted at the pleading stage" and "the precise factual basis for the . . . claim . . . may be hard to identify"; (5) tackling the first element "may create a risk of bad decisionmaking" due to inadequate briefing; (6) discussing both elements risks "bad decisionmaking" because the court is firmly convinced the law is not clearly established and is thus inclined to give little thought to the existence of the constitutional right; or (7) the doctrine of "constitutional avoidance" suggests the wisdom of passing on the first constitutional question because "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." 555 U.S. at 236-42, 129 S. Ct. 808.

a. *The Initial Communications Blackout*

The inquiry into whether a particular right is clearly established for purposes of qualified immunity looks to "whether it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202, 121 S. Ct. 2151. This is a context-specific inquiry. The question, therefore, is whether an officer could believe it was objectively reasonable—in light of the specific context—to impose a complete communications ban where, as here, the officers have no basis to form any individualized suspicion that any detainee has any connection to terrorism.

No court has considered whether—in exigent circumstances analogous to those present here—access to telephones or to outside persons can be curtailed for persons detained for civil immigration violations. As plaintiffs'

counsel conceded during oral argument, in the abstract it is (and was in 2001) hard to draw the line between communications restrictions that are constitutional and those that are not. *See* Oral Arg. Tr. at 49-52. For example, counsel agreed that it may be permissible to impose an "emergency lockdown . . . for a day," but argued that it is clearly established that such a lockdown is unconstitutional when imposed for a longer period. Oral Arg. Tr. at 51. I disagree. Even assuming a lengthier blackout crossed the threshold from permissible to impermissible conduct, I cannot agree that this was so clearly established that qualified immunity is unavailable.[19]

In reaching this conclusion, I take guidance from the Second Circuit's decision in *Iqbal*, 490 F.3d at 143, regarding the significance of the post-9/11 context. Specifically, the court stated that most of the rights asserted here "do not vary with the surrounding circumstances." *Id.* at 159. That category of rights, the court observed, includes "the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination." *Id.* On the other hand, "the gravity of the situation" in the aftermath of the attacks caused the Second Circuit to "recognize that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times." *Id.* The court suggested as an example the Fourth Amendment right to be free from unreasonable

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[19] I acknowledge that I saw this issue differently in *Turkmen I*, 2006 WL 1662663, at *26; however, taking cues both from the Second Circuit's decision in *Iqbal*, 490 F.3d at 159 and the briefing and oral argument on this motion, I have revisited these earlier conclusions.

searches. Whereas a detainee's "right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches" and "the right to be free from excessive force and not to be subjected to ethnic or religious discrimination" are not diminished by exigent circumstances, the court observed that those circumstances might justify an otherwise impermissible warrantless entry into a home. *Id.* at 159-60.

In addition to its potential effect on the *lawfulness* of government conduct, the Second Circuit held that the post-9/11 context has an important bearing on whether law enforcement officers might be justified in *believing*, however incorrectly, that their actions were lawful. *Id.* at 160. Specifically, in reversing on qualified immunity grounds my decision upholding plaintiffs' procedural due process claim, the court referred to the national security concerns at the time in determining that the procedural due process right was not firmly established:

> [U]ncertainty in existing case law is heightened by the fact that, even on the facts alleged in the complaint, which specified that the "of high interest" designation pertained to the Government's post-9/11 terrorism investigation, the investigation leading to the Plaintiff's separation from the general prison population could be reasonably understood by all of the Defendants to relate to matters of national security, rather than an ordinary criminal investigation. Prior to the instant case, neither the Supreme Court nor our Court had considered whether the Due Process Clause requires officials to provide ordinary administrative segregation hearings to persons detained under special conditions of confinement until cleared of connection with activities threatening national security. *Cf.* [*Mitch-*

ell v.] *Forsyth*, 472 U.S. [511] at 534-35 [105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)] (granting Attorney General qualified immunity for warrantless wiretapping for national security purposes despite prohibitions of warrantless wiretapping in criminal context).

Id. at 167

Assuming *arguendo* that plaintiffs' had a right to make phone calls and to be in contact with persons outside the detention facility, and that the right was violated, I conclude that officers of reasonable competence could nonetheless have disagreed about whether their conduct violated that right in light of national security concerns in the aftermath of the 9/11 attacks. Considering the context and the lack of clear case law from the Supreme Court and the Second Circuit, reasonable officers could believe that such a policy—though crude and overbroad—was permissible. Accordingly, I find qualified immunity on these claims for all Defendants.[20]

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[20] I do not reach the merits of whether Plaintiffs' allegations of an express policy to hold the plaintiffs incommunicado states a claim under the First and Fifth Amendments. As discussed above, I am not required to. Moreover, I am mindful of the Supreme Court's admonition in *Camreta v. Greene*, — U.S. —, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011), that lower courts should "think hard, and then think hard again" before unnecessarily deciding the merits of a constitutional issue. *Id.* at 2032. In light of the lack of guidance from the Second Circuit and the Supreme Court on constitutional restrictions on communication rights of pretrial detainees, I conclude that it is appropriate to decline to reach the constitutional question.

b. *The Interference with Access to Families and Friends*

It was not clearly established in September of 2001 that social calls and visits could not be carefully restricted, as a matter of policy, for inmates and detainees in administrative segregation. *See Overton v. Bazzetta*, 539 U.S. 126, 133, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003) (Michigan's severely restrictive visitation program did not violate the Constitution because it constituted "a proper and even necessary management technique to ensure compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.").[21] This conclusion is not changed even assuming, as I must, that the restrictions were imposed here without any individualized assessment of the need for them or suspicion of any connection to terrorism. Even if it were clearly established that the measures alleged here could not be taken lawfully in the absence of individualized intelligence linking each detainee to a security threat, reasonable officers could have concluded otherwise.

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[21] Several district courts in the Second Circuit have since held that various types of restrictions on inmate social contacts do not violate the Constitution. *See, e.g., Griffin v. Cleaver*, 2005 WL 1200532, at *6 (D. Conn. 2005) (inmate had "no constitutional right to telephone use, social visits and commissary privileges"); *Allah v. Poole*, 506 F. Supp. 2d 174, 184-85 (W.D.N.Y. 2007) (not clearly established that a prison could not forbid inmates from speaking languages other than English); *Zimmerman v. Burge*, 2008 WL 850677, at *3 (N.D.N.Y. March 28, 2008) (denial of contact visits for drug-addicted inmate for indefinite period of time exceeding two and one-half years bore rational relationship to legitimate penological interests and therefore did not violate Eighth Amendment).

The frequency of attorney visits is governed by a regulation stating that "The Warden *generally* may not limit the frequency of attorney visits." 28 C.F.R. § 543.13(b) (emphasis added). The regulation permits the warden to "set the time and place for visits" and to "make exceptions according to local conditions or for an emergency situation demonstrated by the inmate or visiting attorney." I owe substantial deference to the institution's interpretation of the regulation. *See Bell*, 441 U.S. at 547, 99 S. Ct. 1861 ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal discipline and to maintain institutional security.") In light of these considerations, and given the breadth of the discretion conferred by the regulation and the lack of case law interpreting the term "generally," I conclude that the alleged limitations on the frequency of attorney visits and phone calls did not violate clearly established law. *See Schick v. Apker*, 2009 WL 2016933, at *9 (S.D.N.Y. March 5, 2009) (collecting pre-2001 cases); *Smith v. O'Connor*, 901 F. Supp. 644, 648 (S.D.N.Y. 1995) (while inmate has constitutional right of access to counsel, this access need not be more than "reasonable"); *Bellamy v. McMickens*, 692 F. Supp. 205, 214 (S.D.N.Y. 1988) (no constitutional violation where plaintiff "does not allege that he was denied absolute access to his counsel by the restrictions on his phone calls, but rather that he was delayed in communicating with his attorney") (citing *Lock v. Jenkins*, 464 F. Supp. 541, 551 (N.D. Ind. 1978) (provision of weekly calls with counsel was sufficient to satisfy Constitution)).

Even though "[a] prison inmate's rights to communicate with family and friends are essentially First Amendment rights," *Morgan v. La Vallee*, 526 F.2d 221, 225 (2d

Cir. 1975), the uncertain contours of those rights, taken together with the national security concerns that permeated the context, sufficed to raise a legitimate question among government officials as to whether the First Amendment required the prison officials to afford the Detainees greater access to legal and social calls. *Iqbal*, 490 F.3d at 167-68. Accordingly, I find that there is qualified immunity for all Defendants for these claims.

c. *Video-taping attorney visits*

The most troubling strand of the interference-with-communications claim is the plaintiffs' allegation that the guards overheard or recorded attorney-client telephone calls and meetings. With some reluctance, I nonetheless conclude that it was insufficiently clear that civil immigration detainees' discussions with their attorneys may not be subject such monitoring under any circumstances, and that qualified immunity is therefore available. Plaintiffs point to no case law from the Second Circuit or the Supreme Court—nor can I find any—that renders it clear that such a policy violates federal constitutional rights. In so holding, I am mindful that there is no need for precedents exactly on point in order for a right to be clearly established. *See Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (holding that a constitutional right is clearly established, if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."). Rather, it is sufficient if, in light of the pre-existing law, "the unlawfulness [is] apparent." *Id.* (internal citations and quotation marks omitted); *See also Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) ("We do not require a case directly on point . . .").

Plaintiffs point out that the recording of inmates' meetings with attorneys is prohibited by 28 C.F.R. § 543.13(e), but "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). The claim for damages here asserts a violation of the First and Fifth Amendments, not § 543.13(e), and it was not clearly established that video and auditory recordings of attorney visits with civil immigration detainees offends the Constitution. *But see Lonegan v. Hasty*, 436 F. Supp. 2d 419, 422 (E.D.N.Y. 2006) (denying qualified immunity because the regulation at issue "was in effect during the time period at issue and remains in effect at present," rendering the prohibition clearly established); *Malik v. Hershberger*, 1995 WL 135558, at *7 (S.D.N.Y. March 29, 1995) (clearly established that guards could not "aural[ly] monitor . . . an attorney-client conversation"). Here again, I conclude that the context of the alleged claims has a legitimate impact on the range of conduct that prison officials could reasonably have believed was justified in the interests of national security. *Iqbal*, 490 F.3d at 167.[22]

F. *Claim Three: Interference with Religious Practice*

The plaintiffs[23] allege that the DOJ defendants' creation and the MDC defendants' implementation of the harsh confinement policy violated their free exercise rights under the First Amendment. Specifically, they

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[22] Because I find that qualified immunity is available, I need not decide whether a *Bivens* remedy is available for these communications-based claims.

[23] Sachdeva and Bajracharya do not assert this claim at all, and Turkmen asserts this claim only against the DOJ defendants.

contend that the defendants intentionally burdened the exercise of their religion by (1) subjecting them to verbal and physical abuse; (2) denying them Halal food; (3) refusing to let them keep a Koran in their cells; and (4) interfering with their daily prayer requirements. They assert this claim against all defendants.

1. *The Availability of a Bivens Remedy*

In *Iqbal*, the Supreme Court assumed without deciding that a *Bivens* claim is available to remedy a deprivation of a prisoner's free exercise rights, but the Court's opinion suggested skepticism on the issue.[24] Defendants contend that a damages remedy under *Bivens* is not available, and thus I must first decide whether to extend *Bivens* to this new context.

Bivens held that the Fourth Amendment implied a damage remedy against an officer who violated it. *Biv-*

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[24] The Court wrote as follows on the subject:

> Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

Iqbal, 556 U.S. at 675, 129 S. Ct. 1937 (some citations and internal quotation marks omitted).

ens, 403 U.S. at 389, 91 S. Ct. 1999. The remedy was extended by *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) to a former congressional employee's claim under the equal protection component of the Fifth Amendment Due Process Clause based on her employer's sex discrimination, and again by *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) to a federal prisoner's Eighth Amendment claim based on deliberate indifference to his medical needs. But in the 24 years "[s]ince *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action." *Minneci v. Pollard*, — U.S. —, 132 S. Ct. 617, 622, 181 L. Ed. 2d 606 (2012). Moreover, two members of the Court have repeatedly described *Bivens* as "a relic of the heady days in which this Court assumed commonlaw powers to create causes of action by constitutional implication," which they would end by limiting the *Bivens* damages remedy "to the precise circumstances" of the three cases in which it was implied. *Id.* at 626 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (Scalia, J., concurring) (internal quotation marks omitted)). Nevertheless, for the reasons discussed below, I hold that *Bivens* should be extended to afford the plaintiffs a damages remedy if they prove the alleged violation of their free exercise rights.

For new contexts in which a *Bivens* remedy has not yet been recognized, deciding the question involves a two-part inquiry: (1) is there an alternative remedial scheme available to the plaintiffs?; and (2) are there "special factors" that "counsel hesitation" in creating the remedy? *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc). I answer both questions in the negative.

There is no remedy for the violation of plaintiffs' free exercise rights in the absence of a *Bivens* claim. The defendants do not contend otherwise. To the contrary, they argue that Congress deliberately chose not to create one. Specifically, they contend that the Immigration and Nationality Act (the "INA") is a comprehensive remedial scheme for the "interest at issue," Ashcroft's Mem. of Law Support Mot. to Dismiss 6, ECF No. 736, presumably referring, at least in part, to the interest in not being subjected to deliberate interference with respect to religious practices. Defendants then admit that the INA affords no remedy for the deprivation of that interest. This decision not to provide plaintiffs with a monetary remedy, the argument concludes, means Congress wanted the judiciary to refrain from extending the *Bivens* remedy into this setting.

This argument, which parallels the Second Circuit's reasoning in *Arar*, does not work in this setting. Arar had been ordered removed by the INS, and the Deputy Attorney General determined that his removal to Syria, where he was tortured, was consistent with the Convention Against Torture. *Arar*, 585 F.3d at 586. The Second Circuit observed that the provision by Congress of a comprehensive and intricate statutory scheme for review of orders of removal, including review of the government's designation of a particular destination country, would ordinarily[25] warrant the conclusion that another

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[25] Since the government actively prevented Arar from availing himself of that statutory scheme, the Second Circuit did not rest its decision on this ground. Rather, proceeding to the second step of the analysis, it concluded that there were special factors counseling hesitation before extending the *Bivens* remedy. *Arar*, 585 F.3d at 573.

remedy for the wrongful delivery of Arar to the Syrians, *i.e.*, a *Bivens* damage remedy, is unwarranted. *Id.* at 572-73.

The plaintiffs in this case do not complain about their deportations. They are complaining about their treatment before they were deported. "Although . . . the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme." *Turkmen I*, 2006 WL 1662663, at *29 (emphases in original).

Most importantly, the plaintiffs are not complaining simply about facially neutral BOP policies that substantially burden their free exercise of religion. If they were, I might conclude that their "full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief . . . and grievances filed through BOP's Administrative Remedy Program," *Malesko*, 534 U.S. at 62, 122 S. Ct. 515, provides sufficiently meaningful redress to preclude the implication of a *Bivens* damages remedy. But the plaintiffs allege a series of acts that were directed only at them (and the class of detainees they seek to represent) with the specific intent to deny them the right to practice their religion. They have sued the individuals who they allege engaged in those acts, and there is no scheme—statutory or regulatory, comprehensive or otherwise—for a person detained in a federal facility to seek *any* remedy from an officer for intentionally and maliciously interfering with his right to practice his religion. The precise purpose of the *Bivens* damages remedy is to deter individual officers from engaging in such unconstitutional conduct. *FDIC v.*

Meyer, 510 U.S. 471, 485, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). In short, for these plaintiffs, as for Bivens himself and the plaintiff in *Passman*, "'it is damages or nothing.'" *Passman*, 442 U.S. at 245, 99 S. Ct. 2264 (quoting *Bivens*, 403 U.S. at 410, 91 S. Ct. 1999 (Harlan, *J.*, concurring in judgment)).[26]

The second inquiry in determining whether a *Bivens* claim should be implied is whether special factors counsel hesitation before doing so. *Arar* makes abundantly clear that "'[s]pecial factors' is an embracing category," and that it takes very little for a particular factor to counsel sufficient hesitation to preclude the *Bivens* remedy. *Arar*, 585 F.3d at 573-74 ("Hesitation is a pause, not a full stop, ... and to counsel is not to require.") As a result, federal officials seeking to fend off extensions of the *Bivens* remedy into other contexts face a "remarkably low" threshold. *Id.* at 574. Yet I conclude the officers here have failed to cross it.

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[26] Because *Bush v. Lucas* may be the source of the Supreme Court's apparent hesitation regarding the availability of a *Bivens* remedy to a First Amendment claim, *see Iqbal*, 556 U.S. at 675, 129 S. Ct. 1937 (citing *Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)), I have examined the case carefully, but I remain confident that the remedy is available here. *Lucas* involved an aerospace engineer's effort to seek a *Bivens* remedy for a free speech claim even though he had already obtained a remedy under a federal workplace protection statute. The key to the Court's refusal to find an implied damages remedy under the Free Exercise Clause was the fact that Congress had already provided "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Lucas*, 462 U.S. at 368, 103 S. Ct. 2404. There are no analogous alternative remedies available to the plaintiffs here.

Among the special factors that have counseled sufficient hesitation to foreclose the extension of *Bivens* are "military concerns; separation of powers; the comprehensiveness of available statutory schemes; national security concerns; and foreign policy considerations." *Id.* at 573 (citations omitted). The defendants here contend that the national security concerns implicated by the September 11 attacks and their aftermath counsel hesitation in implying a *Bivens* remedy for the violation of the detainees' right to free exercise of religion, and thus preclude me from doing so.

Though the argument has some merit, it does not cover as much ground as the defendants want it to. As discussed above, the Second Circuit recognized in *Iqbal* that national emergencies like the September 11 attacks not only furnish the occasion for the full exercise of government power, but may enlarge that power as well. 490 F.3d at 159-60. Thus, though the government ordinarily detains and commences removal proceedings in furtherance of immigration policies, I previously held in this case that its use of that authority in furtherance of an ulterior motive to hold the detainees until they were cleared of suspicions of terrorism was a lawful (even if rarely used) exercise of its existing power. *Turkmen I*, 2006 WL 1662663, at *1. And that existing power can be enlarged by a national security emergency; for example, as Judge Newman observed in *Iqbal*, the exigent circumstances created by such an emergency "might justify governmental action that would not otherwise be permitted" under the Fourth Amendment. *Iqbal*, 490 F.3d at 159.

But context matters, and the right of a person detained in an American prison not to be subjected to malicious mistreatment by federal officers that is specifically in-

tended to deprive him of his right to free exercise of his religion was not diminished by the September 11 attacks. *Id.* at 159-60. Moreover, the defendants have not even attempted to explain why the availability of a damages remedy if the plaintiffs prove their claim would adversely impact our national security even in the slightest. Intuition suggests the opposite: if an American jury finds that federal officers deprived detainees of the Koran and Halal food, refused to tell them the correct time of day, and banged on their cell doors while screaming profanities and anti-Muslim epithets, all for the specific purpose of interfering with their exercise of their Muslim faith, one would think our national security interests would only be enhanced if the world knew that those officers were held liable for the damages they caused.

In sum, the Supreme Court's treatment of this issue in *Iqbal* indeed suggests the "unsettling possibility" that individuals have no right "to pursue a damages claim for intentional, religiously-based mistreatment at the hands of the federal government." James F. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn. St. L. Rev. 1387, 1400 (2010). However, because both of the prerequisites for an extension of *Bivens* have been met, I reject that outcome here and hold that the remedy is available.

2. *The Elements of the Claim*

Plaintiffs allege that the defendants created and implemented the harsh confinement policy with the express intention of burdening their right to practice their religion. Accordingly, they must plead that defendants, with the (1) intent to suppress their religious practices, (2)

burdened those practices.[27] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). However, if such a burden advances interests of the highest order and is narrowly tailored in pursuit of those interests, no claim will lie. *Id.* at 546, 113 S. Ct. 2217.

3. *The Sufficiency of the Allegations*

a. *The DOJ Defendants*

As with their equal protection claim, plaintiffs' free exercise claim against the DOJ defendants is premised upon the DOJ defendants' creation of a facially constitutional policy that was implemented unconstitutionally. Specifically, plaintiffs appear to contend that the DOJ defendants created the harsh confinement policy with the intent to suppress the Detainees' religious practices and that this policy, when implemented by the MDC defendants, did ultimately cause such a burdening of the exercise of their religion.[28]

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[27] When a *neutral* prison policy impinges on inmates' fundamental constitutional rights, the policy is valid if it is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *accord O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987); *Benjamin v. Coughlin*, 905 F.2d 571, 574 (1990). However, because *intentional* burdening of religious practices is involved here, the *Turner v. Safley* standard does not apply.

[28] It may be possible to state a free exercise claim against government officials who cause a burden on a plaintiff's free exercise of his religion not with the specific intent to burden that exercise but with the more general intent to subject people of a particular religion to an adverse action on the basis of that religion. *See Iqbal*, 556 U.S. at 676, 129 S. Ct. 1937 (assuming that intentional discrimination with respect to placement in the ADMAX SHU burdens free

The Complaint fails to plausibly plead that the DOJ defendants intended to burden the plaintiffs' free exercise of their religion. As with plaintiffs' substantive due process claim, this claim appears to rest on an argument that, because their policy was implemented unconstitutionally, they must have intended that result. Thus, for the same reasons set forth in my discussion of the substantive due process claim, I conclude that the DOJ defendants' failure to specify that their policy be implemented lawfully does not raise the reasonable inference that they intended for the policy to be implemented unlawfully. Accordingly, I dismiss the free exercise claim against the DOJ defendants.

b. *The MDC Defendants*

The MDC defendants are alleged to have implemented policies (*e.g.*, forbidding the MDC Detainees from keeping any items, including the Koran, in their cells) that burdened the exercise of their religion. They are also alleged to have failed to stop MDC guards from engaging in abusive conduct unsanctioned by express policy (*e.g.*, verbal and physical abuse) that further burdened the Detainees' religious practices. The Complaint contends that the MDC defendants engaged in such conduct with the intent to suppress the MDC Detainees' religious practices.

With respect to the abusive conduct unsanctioned by express policy, the plaintiffs have adequately pleaded that

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exercise rights) (citing *Lukumi*, 508 U.S. at 540-41, 113 S. Ct. 2217); *cf. McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978). This kind of more general religious discrimination claim does not appear to be advanced by the plaintiffs in this case, and I thus do not consider whether the Complaint might adequately plead such a claim.

the MDC defendants were deliberately indifferent to the known risk that their subordinates, MDC prison guards, would violate the Detainees' free exercise rights. Indeed, as with the First and Fifth Amendment claims discussed above, the Complaint adequately alleges that the MDC defendants were aware of the abusive conduct of the MDC guards. *See* ¶¶ 24-28. None of the MDC defendants contest—and it cannot be reasonably contested—that this policy of inaction satisfies the strict scrutiny required under *Lukumi*. *See* 508 U.S. at 546, 113 S. Ct. 2217. And defendants' inaction in the face of such outrageous abuse suffices, at this stage, to render plausible plaintiffs' allegation that the MDC defendants intended to suppress their religious practices and that the MDC defendants' misconduct caused the plaintiffs' injuries.

With respect to the burdens imposed as a matter of express policy, no question exists that defendants' actions caused the injuries alleged and, as already established, the Complaint adequately pleads intent. Finally, while it is possible that these challenged restrictions may in fact be narrowly tailored to a sufficiently important interest, this is not obvious on the face of the Complaint and defendants must await discovery to so prove. *See Iqbal*, 490 F.3d at 173-74.

4. *Qualified Immunity*

I reject the MDC defendants' argument that they are entitled to qualified immunity. The plaintiffs' right to a reasonable opportunity to worship has long been clearly established. *See, e.g., Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) ("If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded

fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the States against the Buddhist religion"); *see also Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993) (holding that it is "well established that prisoners have a constitutional right to participate in congregate religious services.") And if the well-pleaded allegations of intentional interference with the plaintiffs' religious practices are proven, no officer could reasonably believe that the conduct at issue was lawful. Accordingly, I conclude, as did the Second Circuit in *Iqbal*, that the plaintiffs' allegations in claim three "suffice to preclude a qualified immunity defense at this stage of the litigation." 490 F.3d at 173.[29]

E. *Claim Six: Unreasonable Strip Searches (Fourth Amendment)*[30]

The MDC plaintiffs also bring Fourth Amendment claims against the MDC defendants for subjecting them to unreasonable strip searches.[31] ¶¶ 297-302. They allege that they were strip-searched repeatedly and unnecessarily, in a humiliating and unreasonable manner.

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[29] It bears emphasis that the qualified immunity defense to this claim and the others as well may need to be revisited as the case progresses. I assume, as I must at this stage, the truth of the plaintiffs' factual allegations. At later stages, more will be required of the plaintiffs, and if only some of their allegations are properly supported by admissible evidence, the qualified immunity defense may be available. *See, e.g., Coley v. Smith*, 441 Fed. Appx. 627, 629 (11th Cir. 2011) (failure to provide Muslim inmate with exact food he requested for Eid-ul-Fitr feast on correct day did not violate clearly established law).

[30] Plaintiffs also allege in Claim Six that the strip searches violated their right to substantive due process. That aspect of the claim is discussed above in tandem with Claim One.

[31] Only Benatta and Hammouda assert this claim again Zenk.

1. *Elements of the Claim*

In order to state a claim that the MDC defendants subjected them to unreasonable strip searches in violation of the Fourth Amendment, the plaintiffs must plead that the MDC defendants (1) caused them to be strip searched and (2) that the strip searches were not reasonably related to legitimate penological interests. *See Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992); *Iqbal*, 490 F.3d at 172. A search conducted in an unreasonable manner is not reasonably related to legitimate penological interests. *See Schmerber v. California*, 384 U.S. 757, 768, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

2. *Sufficiency of the Allegations*

The Complaint alleges that the searches were conducted to punish and humiliate, without any penological justification. The MDC plaintiffs allege that they were strip searched every time they were removed from or returned to their cells, including after non-contact legal and social visits, and were subject to random strip searches even while in their cells. They also allege that they were, for example, strip searched multiple times in a row—even though they had no opportunity to acquire anything between the strip searches—and verbally abused and videotaped during the strip searches. The Complaint alleges that these searches were conducted pursuant to a facially unconstitutional policy created and implemented by the MDC defendants.

The Complaint states an unreasonable search claim against all of the MDC defendants. The defendants are alleged to have created a policy that, by its terms, mandated searches that were untethered to any legitimate penological purpose, *see Hodges v. Stanley*, 712 F.2d 34, 35

(2d Cir. 1983) (holding that consecutive body cavity searches of inmates are unreasonable); *Covino*, 967 F.2d at 80 (searches used to harass and punish inmate are unreasonable); *Bono v. Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980) (strip searches of inmates after non-contact visits are unreasonable unless there is some risk that contraband will be smuggled into prison), and performed in a humiliating manner, *cf. Schmerber*, 384 U.S. at 768, 86 S. Ct. 1826. According to the Complaint, Hasty and Zenk ordered the creation of an unreasonable and punitive strip search policy, and Cuciti, with the help of Sherman and Lopresti, developed the specific policy. The MDC defendants do not challenge the plausibility of these allegations, and they clearly suffice to plead that each of the MDC defendants' own actions caused the unreasonable strip searches alleged.

3. *Qualified Immunity*

The allegations against the MDC defendants state a violation of clearly established Fourth Amendment law. It was clearly established at the time that a strip search policy designed to punish and humiliate was not reasonably related to a legitimate penological purpose and thus violated the Fourth Amendment, and no reasonable officer could have believed that the policy alleged was constitutional. *See Iqbal*, 490 F.3d at 173 ("It was clearly established that . . . strip and body-cavity searches be rationally related to legitimate government purposes."); *Hodges*, 712 F.2d at 35.

F. *Claim Seven: Conspiracy to Violate Civil Rights*

Plaintiffs' final claim is brought under 42 U.S.C. § 1985(3), which prohibits conspiracy "for the purpose of depriving . . . any person or class of person of the equal

protection of the laws," and provides a private cause of action against the alleged conspirators. The plaintiffs allege that the DOJ defendants and, separately, the MDC defendants conspired together to hold them in the harsh conditions of confinement discussed herein in violation of their equal protection rights.[32]

1. *Elements of the Claim*

To make out a claim under Section 1985, plaintiffs must plead and prove four elements: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States." *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). The conspiracy must be motivated by some class-based animus. *Iqbal*, 490 F.3d at 176 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

2. *Sufficiency of the Allegations*

For the reasons set forth above, the plaintiffs plausibly plead that Hasty, Zenk, Sherman, Lopresti, and Cuciti implemented the facially discriminatory harsh confine-

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[32] The defendants challenge whether this statute is applicable to them as federal officials in their individual capacities. The Second Circuit has held that, although it was not clearly established in 2001 that Section 1985 prohibited conspiracies among federal officials, "federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws" where the officials' behavior "would violate the equal protection clause."

ment policy and the interference with their free exercise of their religion, all as alleged in Claims One, Two, Three, and Six. The same allegations state a claim for a conspiracy motivated by class based animus and, accordingly, I conclude plaintiffs' § 1985(3) claim is plausibly pleaded as against these MDC Defendants only. *See Iqbal*, 490 F.3d at 177.

3. *Qualified Immunity*

Defendants also suggest that they are entitled to qualified immunity because in 2001 it was not clearly established that Section 1985 applied to federal officials. As the Second Circuit has already explained, however, although it may not have been clearly established in 2001 that § 1985 prohibited conspiracies among federal officials, "federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." *Id.* at 176. "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007) (emphases in original). Accordingly, qualified immunity is inappropriate.

CONCLUSION

For the reasons set forth above, defendants' motions to dismiss are denied in part and granted in part. The motions filed by the DOJ defendants are granted in their entirety. The motions filed by the MDC defendants are granted in part and denied in part. Specifically, they are denied with respect to the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two and Six) and the free exercise claim (Claim Three). They are granted with respect to

the claims based on the alleged communications blackout and interference with counsel (Claims Four and Five). Finally, the motion to dismiss the conspiracy claim (Claim Seven) is denied to the extent that the underlying objects of the conspiracy in Claims One through Six have survived the motion and granted to the extent they have not.

Counsel for the remaining parties are directed to appear before Chief Magistrate Gold for a status conference on January 30, 2013 at 2:00 PM.

So ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 13-981 (L), 13-999(Con), 13-1002(Con),
13-1003(Con), 13-1662(XAP)

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY, DEFENDANTS-APPELLANTS,

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANTS-CROSS-APPELLEES,

SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN, JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT, DEFENDANTS

Dec. 11, 2015

PRESENT: DENNIS JACOBS, JOSÉ A. CABRANES, ROSEMARY S. POOLER, REENA RAGGI, RICHARD C. WESLEY, PETER W. HALL, DEBRA ANN LIVINGSTON, GERARD E. LYNCH, DENNY CHIN, RAYMOND J. LOHIER, JR., SUSAN L. CARNEY, CHRISTOPHER F. DRONEY, Circuit Judges.[1]

ORDER

Following disposition of this appeal, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

ROSEMARY S. POOLER and RICHARD C. WESLEY, Circuit Judges, concur by opinion in the denial of rehearing en banc.

DENNIS JACOBS, JOSÉ A. CABRANES, REENA RAGGI, PETER W. HALL, DEBRA ANN LIVINGSTON, and CHRISTOPHER F. DRONEY, Circuit Judges, dissent by opinion from the denial of rehearing en banc.

ROSEMARY S. POOLER and RICHARD C. WESLEY, Circuit Judges, concurring in the denial of rehearing en banc:

Our dissenting colleagues lament that the majority opinion in this matter presents the first circuit decision in the country allowing a *Bivens* claim for an "executive policy" enacted in response to a national emergency. We disagree. The majority opinion acknowledges that *Iqbal* confirmed that it was constitutionally permissible for the Attorney General to subject de-

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[1] Robert A. Katzmann, Chief Judge, took no part in the consideration or decision of this case.

tainees with suspected ties to terrorism to restrictive conditions of confinement. The majority opinion is unanimous in concluding that plaintiffs have no claim in that regard.

Our differences arise from the significance of what we conclude is a plausibly pled allegation that the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy. The Attorney General is alleged to have endorsed the restrictive detention of a number of men who were Arabs or Muslims or both—or those who appeared to fit those categories—that resulted from the fear and frenzy in greater New York following the 9/11 attacks in which suspicion was founded merely upon one's faith, one's appearance, or one's native tongue.

Moreover, the dissenters fail to note that two of the defendants in this case ran the Metropolitan Detention Center and are alleged to have filed false documents with regard to the risk assessments of detainees and to have encouraged a dangerous environment for those detainees at the facility. As alleged in the complaint and documented by the Inspector General's report and national media, this included assaults, daily strip searches, and numerous other degrading acts. All of these actions, were they to have occurred in a regular prison environment and been employed against an inmate not suspected of posing any security risk, would have been considered unlawfully punitive. *See Bell v. Wolfish*, 441 U.S. 520, 539, 99 S. Ct. 1861 (holding that particular conditions or restrictions of pretrial detention must be reasonably related to a legitimate governmental objective); *see also, e.g., Stoudemire v. Mich. Dep't of Corrs.*, 705 F.3d 560, 574 (6th Cir. 2013)

("'[A] strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual.'" (quoting *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996))). This view accords not only with *Iqbal*, but also with both our own prior precedent and the views expressed by several of our sister circuits in the wake of *Iqbal*. *See, e.g., Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010); *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011).

This case has drawn this Court's attention now for over thirteen years. The majority opinion and dissent have analyzed many arguments (including Judge Raggi's *Bivens* concerns, which were not even advanced by the government) and hundreds of cases. The length of our efforts now fills many pages. In our view, it is time to move the case forward.

DENNIS JACOBS, JOSÉ A. CABRANES, REENA RAGGI, PETER W. HALL, DEBRA ANN LIVINGSTON, and CHRISTOPHER F. DRONEY, Circuit Judges, dissenting from the denial of rehearing en banc:

In this case, a sharply divided panel makes our court the first in the nation to imply a *Bivens* damages action[1] against senior Executive Branch officials—including the former Attorney General of the United States and the Director of the FBI—for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks. *See Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015); *id.* at 265 (Raggi, J., dissenting in

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[1] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

part). The question of whether to rehear this case *en banc* has now evenly divided the active judges of the court (6-6), which means defendants' petitions for rehearing will be denied. We six judges who voted for rehearing respectfully dissent from that denial.[2]

The panel decision raises questions of exceptional importance meriting further review. These concern our court's faithful adherence to controlling Supreme Court precedent respecting (1) the narrow scope of *Bivens* actions, (2) the broad shield of qualified immunity, and (3) the pleading standard for plausible claims. Judge Raggi discusses each of these points in detail in her panel dissent. *See id.* at 265-302. We incorporate that opinion here, which allows us to avoid repeating its analysis in summarizing our reasons for seeking *en banc* review.

* * *

In June 2001, the Supreme Court observed that the threat of "terrorism" might demand "heightened deference to the judgments of the political branches with respect to matters of national security," including "forms of preventive detention" for illegal aliens.

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[2] Our court's historic reluctance to revisit panel opinions *en banc* has been questioned both in cases where we are the outlier in a circuit split, *see* 2002 Judicial Conference of the Second Circuit, Remarks by Justice Ginsburg, 221 F.R.D. 38, 223 (2002) (suggesting Second Circuit might be "a bit too resistant to en banc rehearing"), and in cases where we have deemed the issues so important as to make Supreme Court review likely, *cf. Ricci v. DeStefano*, 530 F.3d 88, 93 (2d Cir. 2008) (Jacobs, C.J., dissenting from denial of rehearing *en banc*) ("If issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits.").

Zadvydas v. Davis, 533 U.S. 678, 696, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Less than three months later, the deadliest terrorist attack in the history of this nation—committed by aliens operating under foreign direction—presented federal officials with what even the panel majority acknowledges were "unprecedented challenges" in protecting our homeland from further harm. *Turkmen v. Hasty*, 789 F.3d at 226.[3] Astoundingly, given these circumstances, this court now implies a *Bivens* damages action—a practice that is generally "disfavored," *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and usually "unjustified," *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)—to expose the former Attorney General, FBI Director, and other federal officials to potentially unlimited personal liability for their efforts to provide such protection.[4]

We are the first court to use *Bivens* to this effect. Four Courts of Appeals—for the Fourth, Seventh, Ninth, and D.C. Circuits—have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks. *See Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (*en banc*); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012);

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[3] *See Ashcroft v. Iqbal*, 556 U.S. 662, 667, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (describing "vast" federal investigation "to identify the assailants and prevent them from attacking anew"); *see also Turkmen v. Hasty*, 789 F.3d at 277 n.19 (Raggi, J., dissenting in part) (discussing various events in five months following 9/11 that fueled fear of further imminent terrorist attacks).

[4] It was the President of the United States who, by written instructions, assigned responsibility for homeland security after 9/11 to the Attorney General and FBI Director, as well as to the CIA Director. *See id.* at 273 n.9 (Raggi, J., dissenting in part).

Mirmehdi v. United States, 689 F.3d 975 (9th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *see also Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009). The panel decision puts this court at odds not only with these sister circuits, but also with controlling Supreme Court precedent in the following three areas of law.

1. *The Proper Scope of Bivens Actions*

After implying damages actions against federal officials on three occasions in the decade between 1971 and 1980, the Supreme Court has never done so again.[5] Rather, it has consistently emphasized that *Bivens* actions are limited to a few established contexts, and that those contexts cannot be generalized to extend *Bivens* further. *See Wilkie v. Robbins*, 551 U.S. at 549-50, 127 S. Ct. 2588. Only by redefining the few established *Bivens* contexts at an impermissibly "high level of generality" has the panel majority here been able to avoid its obligation to consider whether a judicially implied damages action is "the best way" to implement constitutional guarantees in the unprecedented legal and factual circumstances of this case. *Id.* at 500, 561-62, 127 S. Ct. 2588 (requiring such judgment to extend *Bivens*, and recognizing that Congress is usually in "far better position" than courts to evaluate impact of new species of litigation against those who act in public's behalf).[6]

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[5] *See id.* at 267 (Raggi, J., dissenting in part) (tracing history of *Bivens* actions in Supreme Court).

[6] *See id.* at 268-69 (Raggi, J., dissenting in part) (explaining why generalization of *Bivens* contexts elides requirement for considered

The majority thereby further avoids consideration of various factors strongly counseling hesitation in extending *Bivens* here. *See Bush v. Lucas*, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). These factors include the following:

(a) plaintiffs here challenge an executive policy, rather than individual rogue action, the typical *Bivens* scenario[7];

(b) the challenged policy implicates the executive's immigration authority[8];

(c) the policy further implicates the executive's responsibility for national security, here exercised in a time of crisis[9]; and

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judgment about "best way" to implement constitutional guarantees in particular legal and factual circumstances).

[7] *See id.* at 272-74 (Raggi, J., dissenting in part) (discussing why *Bivens* has never been considered "'proper vehicle for altering an entity's policy'" (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001))).

[8] *See id.* at 274-75 (Raggi, J., dissenting in part) (referencing Supreme Court's recognition that "'any policy toward aliens'" is so interwoven with foreign relations, war powers, and other matters "'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference'" absent congressional authorization (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S. Ct. 512, 96 L. Ed. 586 (1952))).

[9] *See id.* at 275-78 (Raggi, J., dissenting in part) (quoting Supreme Court's observation that "'[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention'" in absence of congressional or constitutional authorization, such as habeas corpus guarantee (quoting *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981), and citing *Department of Navy v. Egan*, 484 U.S. 518, 529-30, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988))).

(d) Congress's failure to provide a damages remedy despite longstanding awareness of the concerns raised in this lawsuit.[10]

In opposing *en banc* review, the members of the panel majority attempt to minimize the significance of their *Bivens* ruling by asserting that it does not extend to executive policy challenges but applies only to the Attorney General's alleged ratification of "the rogue acts of a number of field agents in carrying out his lawful policy." Pooler and Wesley, JJ., Op. Concurring in Denial of Reh'g En Banc ("Pooler and Wesley, JJ., Op."), *ante* at [198]. The assertion is belied however both by (1) plaintiffs' complaint, which specifically sues the Attorney General and FBI Director for the policies they allegedly developed and created in response to the 9/11 attacks, *see Turkmen v. Hasty*, 789 F.3d at 227, 263 (quoting Compl. ¶¶ 39-49, 75); and (2) the majority's own opinion, which holds that plaintiffs can use a *Bivens* action against the Attorney General, FBI Director, and others to challenge, not any rogue actions by field agents, but the "MDC confinement *policy*" of holding 9/11 detainees in "'particularly restrictive'" conditions until cleared of terrorist connections, *id.* at 228 (emphasis added) (quoting Compl. ¶ 76); *see id.* at 239 (concluding that pleadings plausibly allege that Attorney General "affirmatively supported" restrictive conditions).

Our concurring colleagues further confuse the issue by lumping together certain challenged policy actions, *e.g.* daily strip searches, with rogue conduct not au-

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[10] *See id.* at 278-80 (Raggi, J., dissenting in part) (tracing Congress's awareness).

thorized by any policy, *e.g.* assaults. *See* Pooler and Wesley, JJ., Op., *ante* at [198]. Plaintiffs' ability to use a *Bivens* action against individual prison officers for such rogue conduct is not at issue on this appeal.

Thus, to ensure this court's adherence to controlling Supreme Court precedent regarding the narrow scope of *Bivens* actions in the context of the restrictive confinement policy challenge here at issue, we should rehear this case *en banc*.[11]

2. *The Broad Shield of Qualified Immunity*

Controlling Supreme Court precedent instructs that qualified immunity must be afforded defendants in this case unless the constitutional rights asserted by plaintiffs were so clearly established with respect to the "*particular* conduct" and the "specific context" at issue that every reasonable official would have understood that his conduct was unlawful. *Mullenix v. Luna*, — U.S. —, 136 S. Ct. 305, 308, 193 — L. Ed. 2d — 255 (2015) (emphasis in original) (internal quotation marks omitted); *see Ashcroft v. al-Kidd*, 563 U.S. 731,

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[11] This court's duty to follow Supreme Court precedent regarding the narrow scope of *Bivens* actions—a matter implicating the separation of powers critical to our constitutional structure, *see id.* at 266 n.2, 267 (Raggi, J., dissenting in part)—exists independently of any arguments made, or not made, by the government. *See generally Valdez v. United States*, 518 F.3d 173, 181-82 (2d Cir. 2008) (recognizing court's discretion to review unpreserved issue to remedy obvious misapplication of law). *Compare* Pooler and Wesley, JJ., Op., *ante* at [198] (asserting that concerns raised in panel dissent were not advanced by government on appeal), *with Turkmen v. Hasty*, 789 F.3d at 268 n.4 (Raggi, J., dissenting in part) (observing that government raised *Bivens* challenge in moving for dismissal but did not pursue after receiving relief on other grounds).

131 S. Ct. 2074, 2080, 2083, 179 L. Ed. 2d 1149 (2011). The panel majority here maintains that plaintiffs, although lawfully arrested and detained, had a right not to be restrictively confined in the absence of an individualized suspicion of dangerousness. But it cites no case clearly establishing such a right, let alone a case clearly establishing the unlawfulness of defendants' *particular* conduct in light of the *specific* context of this case. *See Mullenix v. Luna*, 136 S. Ct. at 308. Instead, considerable precedent, including *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), cited by our concurring colleagues, *see* Pooler and Wesley, JJ., Op., *ante* at [198], suggests that restrictive confinement of lawfully detained persons can be based on general, rather than individualized, suspicion of dangerousness.[12]

We should, therefore, review *en banc* the panel majority's denial of qualified immunity in the unprecedented circumstances of this case.[13]

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[12] *See Turkmen v. Hasty*, 789 F.3d at 277, 290-93 (Raggi, J., dissenting in part) (discussing *Florence v. Bd. of Chosen Freeholders*, — U.S. —, 132 S. Ct. 1510, 1523, 182 L. Ed. 2d 566 (2012); *Whitley v. Albers*, 475 U.S. 312, 316, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986); *Block v. Rutherford*, 468 U.S. 576, 585-87, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984); *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), and detailing experiences giving rise to general suspicion in this case).

[13] In opposing *en banc* review, our concurring colleagues assert that "it is time to move the case forward." Pooler and Wesley, JJ., Op., *ante* at [198]. But qualified immunity dictates that damages actions *not* move forward unless the constitutional right at issue was so clearly established in the particular context of the case as to be beyond dispute. *See Plumhoff v. Rickard*, — U.S. —, 134 S. Ct. 2012, 2019, 188 L. Ed. 2d 1056 (2014) ("Qualified immunity is

3. *The Iqbal Pleading Standard*

In its earlier review of this very case (then bearing a different caption), the Supreme Court made clear that to survive dismissal, plaintiffs had to plead a plausible claim grounded in a factual basis. *See Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. The Court instructed that this standard could not be satisfied by pleading facts "merely consistent with a defendant's liability," because that fell "short of the line between possibility and plausibility." *Id.* (internal quotation marks omitted). As Judge Raggi's careful discussion of the pleadings and incorporated documents demonstrates, the majority's identification of viable claims, particularly policy-challenging claims against the Attorney General and FBI Director, frequently relies only on hypothesized possibilities,[14] or on conclusory assumptions or insinuations of discriminatory purpose that the Supreme Court has already rejected. *See*

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an immunity from suit rather than a mere defense to liability." (internal quotation marks and brackets omitted)); *see also Ashcroft v. Iqbal*, 556 U.S. at 685, 129 S. Ct. 1937 (explaining that "basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery" (internal quotation marks omitted)). Thus, we should not hesitate to take the time for *en banc* review to ensure that the Attorney General, FBI Director, and other officials are not subjected to further litigation based on rights not clearly established by law.

[14] *See Turkmen v. Hasty*, 789 F.3d at 282-90 (Raggi, J., dissenting in part) (explaining how majority's hypotheses as to *possible* involvement of Attorney General and FBI Director in challenged detentions are actually belied by record facts).

Pooler and Wesley, JJ., Op., *ante* at [198] (repeating conclusory assumptions).[15]

The need to ensure faithful adherence to the *Iqbal* pleading standard, pronounced by the Supreme Court in this very case, is thus a further reason for *en banc* review.

* * *

To conclude, we observe that our court's failure to adhere to controlling Supreme Court precedent would raise a serious concern in any case. But here, that concern is compounded by the panel's departure from precedent in *three* areas of law. Further, this concern arises in a case requiring a former Attorney General and FBI Director, among other federal officials, to defend against claims for money damages based on a detention policy applied to illegal aliens in the immediate aftermath of a terrorist attack on this country by aliens. Together, these circumstances present important legal issues warranting full-court review.[16] Fur-

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[15] In *Ashcroft v. Iqbal*, the Supreme Court stated that restrictive confinement of 9/11 detainees until cleared of terrorist activities did not state a constitutional claim absent plausible allegations that the restrictions were "due to" the detainees' "race, religion, or national origin." 556 U.S. at 683, 129 S. Ct. 1937. Further, the Court held that the disparate impact on Arab Muslims of the hold-until-cleared policy was not enough to imply discriminatory intent given that the 9/11 attacks were carried out by Arab Muslim members of an Islamic fundamentalist group comprised largely of Arab Muslims. *See id.* at 682, 129 S. Ct. 1937. Judge Raggi's dissent explains why *Iqbal's* reasoning necessarily defeats plaintiffs' amended pleadings. *See Turkmen v. Hasty*, 789 F.3d at 295-300.

[16] While the focus of our concern in seeking *en banc* review is the panel majority's decision to allow plaintiffs to pursue damages against the Attorney General and FBI Director, Judge Raggi's dis-

ther, the Supreme Court has already once reviewed—and reversed—this court for allowing plaintiffs to pursue deficient claims against the Attorney General and FBI Director in this case. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937. This litigation history, when considered together with the sharp panel division, the even division (6-6) of active judges in the *en banc* poll, and our split from sister circuits, only reinforces the propriety of our rehearing this case ourselves in advance of any possible further consideration by the Supreme Court.

Accordingly, we dissent from the denial of defendants' petitions for *en banc* review.

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sent explains why plaintiffs' policy-based claims against other officials should also be dismissed, obviating the need for us to discuss them here. *See id.* at 293-95, 298-302.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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02 CV 2307 (JG) (SMG)

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA RAJ BAJRACHARYA ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER (MDC); MICHAEL ZENK, FORMER WARDEN MDC, JAMES SHERMAN, FORMER MDC ASSOCIATE WARDEN FOR CUSTODY, SALVATORE LOPRESTI FORMER MDC CAPTAIN, AND JOSEPH CUCITI, FORMER MDC LIEUTENANT, DEFENDANTS

Filed: Sept. 13, 2010

FOURTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Baj-

racharya (collectively "Plaintiffs") by and through their attorneys, allege the following:

NATURE OF ACTION

1. Plaintiffs bring this class action on behalf of themselves and a class of male non-citizens from the Middle East, South Asia, and elsewhere who are Arab, South Asian or Muslim or were perceived by Defendants to be Arab, South Asian or Muslim, and were arrested on minor immigration violations following the September 11, 2001 terrorist attacks on the United States ("9/11 detainees"). Each Plaintiff was subjected to a policy whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation (called "PENTTBOM"), and discovered to be a non-citizen who had violated the terms of his visa, was arrested and treated as "of interest" to the government's terrorism investigation. This of interest treatment did not depend on any law enforcement evaluation; it was automatic and based solely on the race, national origin, and religion or perceived race, national origin, and religion of the Plaintiffs and class members. It did not matter whether the tip was wholly implausible, or even whether the non-citizen was the subject of the tip or just encountered incidentally. In fact, there was no reason to suppose Plaintiffs or class members had any connection to terrorism.

2. Nevertheless, each of interest Plaintiff was subjected to a blanket "hold-until-cleared" policy. Although they could have been removed promptly from the United States because of their immigration violations, pursuant to this policy they were instead retained by the agency then known as the Immigration and Naturalization Service ("INS") in immigration custody until the Federal

Bureau of Investigation ("FBI") affirmatively cleared them of terrorist ties. Eventually, all Plaintiffs and class members were in fact cleared of any connection to terrorism.

3. Plaintiffs and class members were detained without regard to whether they posed a danger or flight risk and were denied a timely hearing before a neutral judicial officer on whether probable cause existed to justify detaining them beyond the time necessary to secure their removal or voluntary departure from the United States. Instead of being presumed innocent until proven guilty, the 9/11 detainees were presumed guilty of terrorism until proven innocent to the satisfaction of law enforcement authorities.[1]

4. Some class members, like Turkmen and Sachdeva ("Passaic Plaintiffs") were detained in Passaic County Jail in New Jersey; others, like Abbasi, Mehmood, Benatta, Khalifa, Hammouda, and Bajracharya ("MDC Plaintiffs") were sent to the Metropolitan Detention Center ("MDC"), a federal facility in Brooklyn, New York. Some of these MDC Plaintiffs, like Hammouda and Benatta, were classified by the FBI as being "high interest" and placed in the most highly restrictive prison setting possible—the MDC's Administrative Maximum Special

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[1] The hold-until-cleared policy was well-documented in a report released by the Office of the Inspector General ("OIG") of the U.S. Department of Justice on June 2, 2003, entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." A copy of this report was appended to the Second Amended Complaint as Exhibit 1, and is incorporated by reference except where contradicted by the allegations of this Fourth Amended Complaint. It is also available at http:/www.usdoj.gov/oig/special/0306/full.pdf.

Housing Unit ("ADMAX SHU")—without any standards or procedures for making such a determination, or any information that they were dangerous or involved in terrorism. Others, like Abbasi, Bajracharya, Mehmood, and Khalifa, were placed in the ADMAX SHU even though they had not been classified "high interest" and despite the absence of any information indicating they were dangerous or involved in terrorism, or any other legitimate reason for such treatment. Although there are specific federal regulations for determining when to subject detainees to administrative or punitive detention, Defendants did not comply with these regulations in subjecting Plaintiffs and class members to this treatment.

5. At Passaic, the 9/11 detainees were kept from practicing their religion. While in the ADMAX SHU, the MDC Plaintiffs and class members were subjected to unreasonable and excessively harsh conditions. They were placed in tiny cells for over 23 hours a day and strip-searched, manacled, and shackled when taken out of their cells. They were physically and verbally abused by their guards. Many were badly beaten. The MDC Plaintiffs and class members were subjected to a communications blackout and other actions that interfered with their ability to communicate with the outside world, their access to counsel and their ability to seek redress in the courts. They were denied recreation and adequate hygiene supplies, and prevented from practicing their faith during their detention.[2]

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[2] This abuse was documented in a second OIG report, issued in December of 2003, entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York." The Supplemental Report was attached without appendices as Exhibit 1 to the Third Amended

6. By creating and implementing the policy to place MDC Plaintiffs and class members in unduly restrictive and punitive conditions of confinement, Defendants Ashcroft, Mueller and Ziglar violated Plaintiffs' and class members' rights under the First, Fourth and Fifth Amendments to the United States Constitution. By detaining Plaintiffs and class members in these conditions and ordering or condoning their abuse, Defendants Hasty, Zenk, Sherman, Lopresti, and Cuciti also violated Plaintiffs' and class members' rights under the First, Fourth and Fifth Amendments to the United States Constitution.

7. By arresting Plaintiffs and class members, detaining them under unreasonable and excessively harsh conditions Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Lopresti, and Cuciti also engaged in racial, religious, ethnic, and national origin profiling. Plaintiffs' and class members' race, religion, ethnicity, and national origin played a decisive role in Defendants' decision to detain them initially and to subject them to punitive and dangerous conditions of confinement in violation of the rights guaranteed to them by the Fifth Amendment to the United States Constitution.

8. Plaintiffs seek compensatory and punitive damages for themselves and all class members, and an award of costs and reasonable attorneys' fees.

JURISDICTION AND VENUE

9. This action is brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), under the First, Fourth,

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Complaint, and is incorporated by reference except where contradicted by the allegations of this Fourth Amended Complaint. It is also available at http://www.usdoj.gov/oig/special/0312/final.pdf.

and Fifth Amendments to the Constitution and 42 U.S.C. § 1985(3).

10. This Court has jurisdiction under 28 U.S.C. § 1331.

11. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

JURY DEMAND

12. Plaintiffs demand trial by jury in this action on each and every one of their claims.

PARTIES

The MDC Plaintiffs

13. Plaintiff AHMER IQBAL ABBASI is a South Asian Muslim, and a native and citizen of Pakistan. He currently lives in Pakistan with his wife and three children and works as a supervisor at a construction company. Abbasi has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

14. Plaintiff ANSER MEHMOOD is also a South Asian Muslim, and a native and citizen of Pakistan. He is Abbasi's brother-in-law. He currently lives in Pakistan with his father, wife, and four children. He has had difficulty finding work in Pakistan, and has had to rely on his father's financial support. Mehmood has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

15. Plaintiff BENAMAR BENATTA is an Arab Muslim, a native of Algeria, and has protected refugee status

in Canada. Benatta has not been able to find steady work since his detention in the United States. He currently lives in Canada and is pursuing a graduate degree in Aeronautics at the University of Toronto. Benatta has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

16. Plaintiff AHMED KHALIFA is an Arab Muslim, and a native and citizen of Egypt. He currently lives in Egypt with his parents. Khalifa is a doctor and works as a general practitioner. Khalifa has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

17. Plaintiff SAEED HAMMOUDA is an Arab Muslim, and a native and citizen of Egypt. He currently lives in Egypt with his mother. He is the owner and manager of a medical supplies company called ADVAMED. Hammouda has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

18. Plaintiff PURNA RAJ BAJRACHARYA is a South Asian Buddhist, and a native and citizen of Nepal. He currently lives in Katmandu with his wife, sons, and daughters-in-law, and is retired. Bajracharya has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

The Passaic Plaintiffs

19. Plaintiff IBRAHIM TURKMEN is Muslim, and a native and citizen of Turkey, where he lives with his wife and four daughters. Turkmen has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

20. Plaintiff AKHIL SACHDEVA is a South Asian Hindu, and a native and citizen of India. He currently lives in Canada. Mr. Sachdeva has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

Defendants

21. At all times relevant to this complaint Defendant JOHN ASHCROFT was the Attorney General of the United States. As Attorney General, Ashcroft had ultimate responsibility for the implementation and enforcement of the immigration laws. He is the principal architect of the policies and practices challenged here, and he directed his subordinates to implement them. Along with a small group of high-level government employees, Ashcroft created the hold-until-cleared policy and directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members. With that same group, he also created many of the unreasonable and excessively harsh conditions under which Plaintiffs and other class members were detained, and authorized others of those conditions. Ashcroft ordered the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Ashcroft is sued in his individual capacity.

22. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation. Mueller was part of the small group of government employees who, under Ashcroft's direction, created the hold-until-cleared policy, directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members,

and decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement. Mueller condoned the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Mueller is sued in his individual capacity.

23. At all times relevant to the complaint Defendant JAMES W. ZIGLAR was the Commissioner of the INS. As INS Commissioner, Ziglar had immediate responsibility for the implementation and enforcement of the immigration laws. He was the INS' chief executive officer. Ziglar was part of the small group of government employees who, under Ashcroft's direction, created the hold-until-cleared policy, directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members, and decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement. Ziglar condoned the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Ziglar is sued in his individual capacity.

The MDC Defendants

24. Defendant DENNIS HASTY was the Warden of the MDC until the spring of 2002. While Warden, Hasty had immediate responsibility for the conditions under which MDC Plaintiffs and other class members were confined at the MDC. He ordered the creation of the ADMAX SHU at the MDC for the purpose of confining Plaintiffs and other class members under unreasona-

ble and excessively harsh conditions in violation of the Constitution. He allowed his subordinates to abuse MDC Plaintiffs and class members with impunity by ignoring some evidence of this abuse and avoiding other evidence—for example, by neglecting to make rounds on the ADMAX unit as required by BOP policy. Despite his attempt to remain blind to the conditions experienced by MDC Plaintiffs and class members, Hasty was made aware of the abuse that occurred through inmate complaints, staff complaints, hunger strikes, and suicide attempts, and did not take any actions to rectify or address the situation. Hasty is sued in his individual capacity.

25. Defendant MICHAEL ZENK was the Warden of the MDC in the Spring of 2002 and after. As Warden, Zenk had immediate responsibility for the conditions under which MDC Plaintiffs and other class members were confined at the MDC. He ordered that MDC Plaintiffs and other class members be confined in the ADMAX SHU of the MDC under unreasonable and excessively harsh conditions in violation of the Constitution. He also allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. He made rounds on the ADMAX and was aware of conditions there. Zenk is sued in his individual capacity.

26. At all times relevant to this complaint, Defendant JAMES SHERMAN was the MDC Associate Warden for Custody. Sherman assisted the other defendants in creating the unreasonable and excessively harsh conditions in the ADMAX SHU and allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. Sherman made rounds on the ADMAX SHU and was aware of conditions there. Sherman is sued in his individual capacity.

27. At all times relevant to this complaint, Defendant SALVATORE LOPRESTI was the Captain of the MDC, and thus had responsibility for supervising all MDC correctional officers, including those who worked on the ADMAX. Lopresti was also responsible for overseeing the ADMAX unit. Lopresti took part in creating the unreasonable and punitive conditions on the ADMAX unit at the request of Hasty. Lopresti was frequently present on the ADMAX Unit, regularly reviewed documentation of some of the abuses, and received numerous complaints from 9/11 detainees about abuse and mistreatment. Despite this information, he did not take any actions to rectify or address the situation. Lopresti is sued in his individual capacity

28. At all times relevant to this complaint, Defendant JOSEPH CUCITI was First Lieutenant at the MDC, and was the institution's coordinator with law enforcement officers who sought to interrogate the 9/11 detainees. In that capacity he was responsible for escorts, processing, attorney/client and social visits, and other aspects of the 9/11 detentions. Cuciti drafted MDC's policies regarding conditions in the ADMAX SHU and developed the policy for strip-searches on the ADMAX Unit. Cuciti made rounds on the ADMAX SHU and reviewed logs created by that unit; in those and other ways he heard complaints from MDC Plaintiffs and class members regarding the conditions and abuse described below, yet failed to take any steps to rectify that abuse. Cuciti is sued in his individual capacity

CLASS ACTION ALLEGATIONS

29. Plaintiffs seek to represent a Plaintiff class consisting of all male non-citizens from the Middle East, South Asia and elsewhere who are Arab or Muslim,

or were perceived by Defendants as Arab or Muslim, and who were:

a. arrested by the INS or FBI after the September 11, 2001 terrorist attacks and charged with immigration violations;

b. treated as being "of interest" to the government's terrorism investigation and subjected to a blanket "hold-until-cleared" policy pursuant to which they were held without bond, without evidence of dangerousness or flight risk, until cleared of terrorist ties by the FBI; and

c. detained at MDC or Passaic County Jail.

30. Plaintiffs and the other members of the class were subjected to the policies and practices described in paragraphs 1 through 7 of this Fourth Amended Complaint, and more fully hereafter.

31. The members of the class are too numerous to be joined in one action, and their joinder is impracticable, in part because Defendants kept their identities secret until long after they were deported from the United States. While the exact number is presently unknown to Plaintiffs' counsel, the Department of Justice Office of Inspector General was able to identify approximately 475 9/11 detainees who were held at MDC and Passaic and were subjected to the policies challenged in this action.

32. Common questions of law and fact exist as to all class members and predominate over questions that affect only the individual members. These common questions include:

a. whether Defendants adopted, promulgated, and implemented policies and practices depriv-

ing MDC Plaintiffs and class members of their liberty without due process of law in violation of the Fifth Amendment by subjecting them to outrageous, excessive, cruel, inhumane, and degrading conditions of confinement;

b. whether Defendants adopted, promulgated, and implemented a policy and practice of depriving Plaintiffs and class members of equal protection of the law in violation of the Fifth Amendment by placing them in restrictive conditions of confinement because of their race, religion, ethnicity, and/or national origin;

c. whether Defendants adopted, promulgated, and implemented a policy and practice which violated Plaintiffs' and class members' rights under the First Amendment to practice their religion.

33. Plaintiffs' claims are typical of those of the class for reasons that include the following:

a. each Plaintiff is a male non-citizen of Middle Eastern or South Asian descent who is Arab or Muslim, or was perceived by Defendants to be Arab or Muslim;

b. each Plaintiff was arrested and detained subsequent to the September 11 terrorist attacks and charged with minor (but deportable) immigration violations;

c. each Plaintiff was treated as "of interest" to the PENTTBOM investigation, and subjected to a blanket "hold-until-cleared" policy pursuant to which he was held in INS detention, without regard to evidence of danger or flight risk, until cleared of terrorist ties by the FBI;

d. each Plaintiff housed in MDC was held under unreasonable and excessively harsh conditions of confinement, and subjected to a communications blackout;

e. each Muslim Plaintiff was denied an opportunity to practice his religion; and

f. the race, religion, ethnicity and/or national origin of each Plaintiff (real or perceived) played a determinative role in Defendants' decision to detain him.

34. The legal theories on which Plaintiffs rely are the same or similar to those on which all class members would rely, and the harms suffered by them are typical of the harms suffered by the other class members.

35. Plaintiffs will fairly and adequately protect the interests of the class. The interests of the class representatives are consistent with those of the class members. In addition, Plaintiffs' counsel are experienced in class actions and civil rights litigation.

36. Plaintiffs' counsel know of no conflicts of interest among class members or between the attorneys and class members that would affect this litigation.

37. Use of the class action mechanism here is superior to other available methods for the fair and efficient adjudication of the claims and will prevent the imposition of undue financial, administrative, and procedural burdens on the parties and on this Court which individual litigation of these claims would impose.

38. The Plaintiff class should be certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure because common questions of law and fact predominate and

a class action is a superior way to fairly and efficiently adjudicate the controversy.

STATEMENT OF FACTS

The Ashcroft Sweeps & the Hold-Until-Cleared Policy

39. Immediately after September 11, Ashcroft created and implemented a policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism. Under Ashcroft's orders, the round-up and detentions were undertaken without a written policy, to avoid creating a paper trail.

40. The FBI set up a tip line after September 11, and tips poured in from civilians across the nation. Within a week, 96,000 tips had been received, most of them based upon terrified citizens' discriminatory notions about Arabs and Muslims. Contrary to prior FBI practice, Mueller ordered that every one of these tips be investigated, even if they were implausible on their face, or based solely on suspicion of an individual due to his religion, ethnicity, country of origin or race.

41. While every tip was to be investigated, Ashcroft told Mueller to vigorously question any male between 18 and 40 from a Middle Eastern country whom the FBI learned about, and to tell the INS to round up every immigration violator who fit that profile. FBI field offices were thus encouraged to focus their attention on Muslims of Arab or South Asian descent. Both men were aware that this would result in the arrest of many individuals about whom they had no information to connect to terrorism. Mueller expressed reservations about this result, but nevertheless knowingly joined Ashcroft in creating and implementing a policy that targeted innocent Muslims and Arabs.

42. The FBI field offices followed this guidance in investigating Plaintiffs and class members. For example, the head of the New York FBI field office stated that an individual's Arab appearance and status as a Muslim were factors to consider in the investigation. Another supervisor in the New York FBI field office who oversaw the clearance process stated that a tip about Russian tourists filming the Midtown tunnel was "obviously" of no interest, but that the same tip about Egyptians was of interest.

43. The resulting investigation focused on men who were Muslim and South Asian or Arab, or who were perceived as such. With a few exceptions, the detainees were almost entirely Muslim and South Asian or Arab. The few swept up for immigration violations during the PENTTBOM investigation who did not fit this profile were treated differently than Plaintiffs and class members. For example, five Israelis detained for allegedly celebrating on September 11 ended up at MDC, but they received legal and consular visits in early October, before anyone else in the unit, and they were among the first detainees to be moved from the ADMAX SHU to general population and dropped from the INS custody list, all without clearance letters from the FBI. Another detainee, who happened to be the roommate of an acquaintance of several of the hijackers, was also cleared quickly —within six weeks of his arrest; the FBI summary noted only his lack of relevance to the PENTTBOM investigation and that he was either Austrian or Australian. One detainee with a Spanish surname was picked up while investigators were following a lead about a Yemeni store owner, but determined to be of "no PENTTBOM connection" without any clearance investigation, or even the assignment of an investigator. Thus the New York FBI field office was authorized to release him without any

clearance letter from FBI headquarters in contradiction to the hold-until-cleared policy applied to Muslim, Arab and South Asian non-citizens.

44. In contrast, Muslim, Arab and South Asian non-citizens were treated as "of interest" to the PENTTBOM investigation without a determination by any FBI or other law enforcement officer that the non-citizen had engaged in any suspicious behavior, or identification of any reason to believe the individual had information about terrorism or was involved in the 9/11 attacks.

45. In the words of one high-ranking Department of Justice official, there was "custody without triage"—that is, without any attempt to sift out detainees of actual interest to the investigation from those who were not. There was, said the same official, "no clear vetting" of detainees, and he was concerned early in the investigation that detainees were being held simply on the basis of their ethnicity. Similarly, Defendant Mueller told OIG investigators that he was not aware of any guidance or policy for determining whether a detainee was of special interest.

46. Several highly placed law enforcement officers, including the Assistant Director in Charge of the New York field office of the FBI, disagreed with this approach and challenged its implementation, arguing that law enforcement efforts must focus on individuals for whom the office had developed evidence were connected to terrorism. Their expertise was ignored.

47. Ashcroft, Mueller and Ziglar received detailed daily reports of the arrests and detentions and were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as

"of interest" to the PENTTBOM investigation. Indeed, in October 2001 all three learned that the New York field office of the FBI was keeping a separate list of noncitizens, including many Plaintiffs and class members, for whom the FBI had not asserted any interest (or lack of interest). Against significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members be detained until cleared and otherwise treated as "of interest." Mueller and Ziglar were fully informed of this decision, and complied with it.

48. Ashcroft, Mueller, and Ziglar's decision to hold these hundreds of non-citizens for criminal investigation without evidence of any ties to terrorism was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant information about them.

49. Pursuant to this policy, the FBI directed the INS to arrest and detain well over 1,200 male non-citizens from the Middle East, South Asia, and elsewhere who appeared to be Arab or Muslim, including Plaintiffs and class members, on minor immigration violations—such as overstaying visas, working illegally on tourist visas, or failing to meet matriculation and/or course work requirements for student visas.

50. While the INS had previously sought to remove non-citizens for these violations, it generally did not detain them during their removal proceedings.

51. The Immigration and Nationality Act ("INA") provides that "an alien may be arrested and detained

pending a decision on whether the alien is to be removed from the United States." INA § 236(a); 8 U.S.C. § 1226(a). However, only non-citizens with certain criminal convictions fall within the INA's "mandatory detention" provision. INA § 236(c); 8 U.S.C. § 1226(c). Plaintiffs squarely fall within the discretionary detention statute, and therefore must be provided an individualized custody determination by the Service and, if requested, by an Immigration Judge. The INS took a different approach with Plaintiffs and class members, not because they violated the immigration laws—that alone does not justify de facto mandatory immigration detention—but rather because Ashcroft, Mueller and Ziglar categorized them as potential (although not actual or even probable) terrorists based on vague suspicions rooted in racial, religious, ethnic, and/or national origin stereotypes rather than in hard facts.

52. Many 9/11 detainees were held for weeks or months in INS facilities, federal detention centers, or county jails, without any charges being filed against them and without any hearing on the reasons for their detention. Eventually, the INS filed civil charges against most 9/11 detainees, alleging minor immigration violations. In the months to come, some detainees were also charged with minor criminal offenses related to their immigration violations, like possession of a fraudulent social security card.

53. Because the FBI lacked probable cause to hold Plaintiffs and class members on criminal charges, Ashcroft ordered Mueller and Ziglar to use the immigration law as a pretext to detain the 9/11 detainees while investigating them for potential ties to terrorism. Although Plaintiffs and class members were purportedly being held

under the authority of the civil immigration law, Ashcroft placed Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division, in charge of the round-ups.

54. After immigration hearings, Plaintiffs and class members received final removal orders or accepted voluntary departure orders. Even though the INS could have promptly secured the removal or voluntary departure of these individuals, it kept them in custody for up to five months or more after the issuance of their final immigration orders—far longer than necessary to secure their departure from the United States, and well beyond the time that the INS is statutorily authorized to detain them. 8 U.S.C. § 1231(a)(1) (90-day removal period); 8 U.S.C. § 1229c(b)(2) (60-day period for voluntary departure granted at the conclusion of removal proceedings).

55. Plaintiffs and class members were kept in custody after the issuance of final removal or voluntary departure orders pursuant to Ashcroft's order that all non-citizens encountered during the PENTTBOM investigation be held in custody until they received a "clearance" from the FBI absolving them of any link to terrorists or terrorist activities. FBI clearances frequently took four months or longer. Ziglar, although concerned that the detentions overstepped the INS's statutory authority, complied with this requirement. So did Mueller. Ashcroft, Mueller, and Ziglar implemented this policy because of the same race, religion, and national origin stereotypes that prompted them to detain Plaintiffs in the first place.

56. These policies were created at the highest levels of Government, and their implementation was closely overseen by Ashcroft, Mueller, and Ziglar. Initially, the PENTTBOM investigation, consistent with FBI policy,

was run out of the FBI field offices. But shortly after September 11, Mueller changed that policy, and ordered that the investigation would be run out of FBI Headquarters, under his direct control. The nerve center of the 9/11 investigation was the Strategic Information and Operations Center, called SIOC, at FBI Headquarters.

57. Mueller personally directed the investigation out of SIOC for the FBI and was in daily contact with the FBI field offices regarding the status of individual clearances. Even after the New York field office of the FBI determined that a Plaintiff or class member had no connection to terrorism, Mueller would not authorize that person to be "cleared" until Headquarters reviewed and signed off on the details of the investigation and received a completed name trace from the Central Intelligence Agency ("CIA"). Many 9/11 detainees, including all of the MDC Plaintiffs, were cleared by the New York field office of any connection to terrorism and then detained for months in restrictive confinement while Headquarters considered their cases. Concerns expressed by FBI field office personnel about this delay were ignored by Headquarters. Mueller made this change because of the same race, religion, and national origin stereotypes that prompted him to detain Plaintiffs in the first place.

58. As a matter of policy and practice, and in keeping with its "hold-until-cleared" policy, the INS did not conduct post-order custody reviews for 9/11 detainees held more than 90 days after their final removal orders. These reviews are required by the INS regulations at 8 C.F.R. § 241.4, and provide that detainees must be given 30 days notice of the review and that the INS must complete the review 90 days after the issuance of a final removal order. Plaintiffs and class members were not giv-

en notice of such a review and no such review was conducted.

59. No one told Plaintiffs and class members why they had been singled out for prolonged investigation and denied custody reviews. Many were told they would be deported shortly after they received final orders, as required by the immigration law. Months passed and they remained in custody, leading them to believe they might be held forever.

60. Ashcroft, Mueller and Ziglar adopted, promulgated, and implemented these detention policies based on invidious animus against Arabs and Muslims, in violation of the First and Fifth Amendments to the Constitution. Evidence of this invidious animus includes:

a. there was no non-discriminatory reason to hold Plaintiffs and class members for investigation, yet Ashcroft, Mueller, and Ziglar delayed their deportation and placed them in restrictive confinement anyway;

b. these unconstitutional detention policies have not been applied to all noncitizens in the United States alleged to have violated the immigration laws;

c. the few individuals arrested in the sweeps who did not fit this profile were cleared quickly, or moved into general population without clearance;

d. Plaintiffs and class members were verbally abused and subjected to statements slandering the Muslim faith and their adherence to it by the Defendants, including Ashcroft, who expressed anti-Muslim sentiments, including a statement identifying Christianity by its central theological

tenet, but Islam, in contrast, by the views of a small group of extremists: "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.";

c. Plaintiffs and class members were targeted for disparate treatment by Ashcroft, who announced the policy that Plaintiffs and class members would be arrested and detained for any reason regardless of the *de minimis* nature of their infractions, and thereby eliminated for Plaintiffs and class members any access to the fair and reasonable discretion of law enforcement officials. This fair and reasonable discretion remained available to non-Arab and non-Muslim individuals who were non-citizens. Defendant Ashcroft's policy announcement stated: "Let the terrorists among us be warned. If you overstay your visa even by one day, we will arrest you. If you violate a local law we will . . . work to make sure that you are put in jail and . . . kept in custody as long as possible." Although Ashcroft referred in this statement to "terrorists," it describes the policy he applied to Arab and South Asian Muslims with no connection to terrorism.

f. Consistent with Defendant Ashcroft, Mueller and Ziglar's personal bias against Muslims, South Asians, and Arabs, the Defendants also directed the Department of Justice to engage in the following policies, not challenged by this lawsuit, but also based entirely on suspicion of individuals because they belonged to these particular groups: (1) The Absconder Apprehension Initiative, which

was designed to "locate, apprehend, interview, and deport" approximately "several thousand" individuals from predominantly Muslim countries. See Memorandum, the Deputy Attorney General, U.S. Dep't of Justice, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002); (2) Mandatory detention for asylum seekers from Arab and South Asian nations. See http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_12.htm; (3) Special registration, which requires aliens from Arab and South Asian countries, almost all of which are predominantly Muslim, to report to immigration authorities to be fingerprinted and photographed, and often interrogated and detained. See Registration of Certain Nonimmigrant Aliens From Designated Countries, 68 Fed. Reg. 8046 (Feb. 19, 2003); 68 Fed. Reg. 2363 (Jan. 16, 2003); 67 Fed. Reg. 77,642 (Dec. 18, 2002); 67 Fed. Reg. 77,136 (Dec. 16, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002); 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed. Reg. 57,032 (Sept. 6, 2002); (4) According to sources within the Department of Justice, Ashcroft also ordered the INS and FBI to investigate individuals with Muslim-sounding names from vast sources of data, including INS records of entering noncitizens, as well as the phonebook.

Conditions of Confinement & Abuse

61. In the first few months after 9/11, Ashcroft and Mueller met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation, including Plain-

tiffs and class members. The group discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings. The group also decided to spread the word among law enforcement personnel that the 9/11 detainees were suspected terrorists, or people who knew who the terrorists were, and that they needed to be encouraged in any way possible to cooperate.

62. Commissioner Ziglar was at many of these meetings, and he discussed the entire process of interviewing and incarcerating out-of-status individuals with Ashcroft and others.

63. Ashcroft insisted on regular, detailed reporting on arrests. He wanted precise numbers, and received a daily Attorney General's Report on persons arrested and other developments of interest. He used this report for daily briefings of the President and the National Security Council on the progress of the investigation.

64. Ziglar was ultimately responsible for providing much of this information to Ashcroft, and had twice daily briefings with his staff regarding the 9/11 detentions.

65. The punitive conditions in which MDC Plaintiffs and class members were placed were the direct result of the strategy mapped out by Ashcroft and Mueller's small working group. These conditions were formulated in consultation with the FBI, and designed to aid interrogation. Indeed, sleep deprivation, extremes of temperature, religious interference, physical and verbal abuse, strip-searches, and isolation are consistent with techniques developed by the C.I.A. to be utilized for interrogation of "high value detainees."

66. There were not enough secure beds in federal jails like MDC to hold all the 9/11 detainees, so Ashcroft, Mueller and Ziglar's orders to encourage the 9/11 detainees to cooperate were implemented differently for the Passaic Plaintiffs and class members. Passaic Plaintiffs were denied the ability to practice their religion, were held in overcrowded general population units with convicted felons, and were subjected to physical and verbal abuse, including being menaced by dogs. However, they were not held in isolation or otherwise placed in restrictive confinement.

67. Ashcroft, Mueller and Ziglar knew that the FBI had not developed any reliable evidence tying Plaintiffs and class members to terrorism, yet authorized their prolonged detention in restrictive conditions nonetheless. Indeed, Mueller ordered that MDC Plaintiffs and class members be kept on the INS Custody list (and thus in the ADMAX SHU) even after local FBI offices reported that there was no reason to suspect them of terrorism. For Mueller, the absence of suspicion was not enough; the CIA, which had no role in arresting class members or designating them "of interest," had to be asked if it could find some basis for suspicion.

68. To implement Ashcroft, Mueller and Ziglar's policy, Wardens Hasty and Zenk ordered their subordinates to ignore BOP regulations regarding detention conditions. BOP regulations limit the circumstances in which detainees may be placed in the SHU and require an employee known as the Segregation Review Official to conduct a weekly review of the status of each inmate housed in the SHU after he has spent seven days in administrative detention or disciplinary segregation. The Segregation Review Official is also required to conduct a formal

hearing every 30 days assessing the inmate's status. These review processes were not conducted for the 9/11 detainees. Instead, Wardens Hasty and Zenk ordered prolonged placement of MDC plaintiffs and class members in the ADMAX SHU without following the processes they knew the law required for such deprivation. Reports for 9/11 detainees in MDC's ADMAX SHU were automatically annotated with the phrase "continue high security," and no hearing took place. Plaintiffs and class members were thus denied a fair review process in which to challenge their conditions of confinement.

69. MDC Defendants were aware that the FBI had not developed any information to tie the MDC Plaintiffs and class members they placed in the ADMAX SHU to terrorism. On a regular basis, an MDC intelligence officer received print-outs of the FBI and INS's 9/11 detainee lists and databases so that he could update Hasty, Sherman, and Lopresti about the investigations. These regular written updates included summaries of the reason each detainee was arrested, and all evidence relevant to the danger he might pose to the institution. Hasty, Sherman and Lopresti shared the information with Cuciti and other MDC staff.

70. The updates demonstrated the dearth of information connecting MDC Plaintiffs and class members to terrorism or raising a concern that they might pose a danger to the facility. For example, with respect to Khalifa, MDC Defendants were informed only that he was arrested because he was "encountered by INS" while following an FBI lead and charged with a violation of the INA. They were further informed that Khalifa had no INS applications, petitions or extensions pending, and that the "FBI may have an interest" in him. No other

information was provided. As the briefing was designed to alert MDC staff to all information relevant to the question of whether Khalifa posed a security threat to the institution, the lack of any specific or incriminating information put MDC Defendants on notice of the inappropriateness of holding all 9/11 detainees in restrictive confinement without individualized assessments.

71. Similarly, MDC Defendants were informed that Mehmood was arrested because he was "encountered" by federal agents while executing a search warrant pursuant to an FBI lead; that his residence contained documents related to fraudulent Pakistan passports, credit card fraud, and "other criminal violations;" that he was charged with a "B1 [visa] overstay," and that he was in possession of fraudulent Social Security cards. The update included no statement of FBI interest in Mehmood.

72. MDC Defendants were informed that Abbasi was "encountered" by INS pursuant to an FBI lead; that he used a fraudulent passport to enter the U.S. to seek asylum, and later destroyed that passport; that he requested and was denied various forms of immigration relief; that he obtained and used a fraudulent advance parole letter to enter the country, and that he was thus inadmissible. The update included no statement of FBI interest in Abbasi.

73. The exact language of these updates was repeated weekly, indicating the continued lack of any information tying Khalifa, Mehmood, or Abbasi to terrorism, or tending to show that any of them might pose a danger. Despite this clear demonstration that the FBI had no information to connect the 9/11 detainees to terrorism or suspect them of dangerousness, Hasty, Sherman, and Lopresti continued to hold all the MDC Plaintiffs and class

members in restrictive and punitive confinement, without undertaking the required individualized assessment of whether each individual posed a danger to the facility or otherwise required close supervision.

74. Hasty, Sherman, Lopresti, and Cuciti were aware that placing the 9/11 detainees in the ADMAX SHU unit without an individualized determination of dangerousness or risk was unlawful; thus, Lopresti signed a document that was prepared by Cuciti, and approved by Hasty and Sherman, which untruthfully stated that the executive staff at MDC had classified the "suspected terrorists" as "High Security" based on an individualized assessment of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." In reality, none of the MDC Defendants saw or considered information in any of these categories in deciding to place the 9/11 detainees in the ADMAX SHU. Indeed, after a few months of interacting with MDC Plaintiffs and class members, the MDC Defendants realized that they were not terrorists, but merely immigration detainees. Nevertheless, the restrictive conditions and harsh treatment continued.

75. To carry out Ashcroft, Mueller and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment designed to obtain their cooperation, Hasty ordered Lopresti and Cuciti to design extremely restrictive conditions of confinement. These conditions were then approved and implemented by Hasty and Sherman, and, later, by Zenk.

76. As a result, detention in the ADMAX SHU entailed severe deprivations of liberty beyond those authorized by the BOP for administrative or disciplinary segregation. An ADMAX SHU is a particularly restrictive type of SHU not found in most BOP facilities because the

normal SHU is usually sufficient for correcting inmate misbehavior and addressing security concerns. Indeed, the only other ADMAX SHU in existence at the time of Plaintiffs' detentions was the BOP's high security unit in Florence, Colorado, where the most dangerous convicted criminals are held. The ADMAX SHU at MDC was established after September 11, 2001 to make available more restrictive confinement. Unlike the regular SHU, in the ADMAX SHU detainees were handcuffed, shackled, chained, and accompanied by four guards whenever they left their cell, which was only permitted for extremely limited purposes. Two cameras were placed in each cell to monitor each inmate 24 hours a day, hand-held cameras recorded their movements whenever they left their cells, and the lights were left on 24 hours a day. Unlike detainees in the general population at MDC, detainees in the ADMAX SHU were detained in their cell for at least 23 hours a day, and were not allowed to move around the unit, use the telephone freely, or keep any property, even toilet paper, in their cell. MDC Plaintiffs and class members were subjected to these restrictive conditions in the ADMAX SHU for between three and eight months pursuant to a written policy drafted by Cuciti, signed by Lopresti, and approved by Sherman and Hasty, and subsequently by Zenk.

77. Further, Hasty facilitated his subordinates' multifaceted abuse of MDC Plaintiffs and class members by referring to the detainees as "terrorists," purposely avoiding the ADMAX unit, and isolating them from any avenue of complaint or assistance. All the MDC Defendants allowed Plaintiffs and class members to be beaten and harassed by ignoring direct evidence of such abuse, including logs and other official documents, videotapes, and detainee complaints. MDC Defendants used

the harsh detention conditions as an intentional means of punishing, harassing, and "breaking" the MDC Plaintiffs and class members.

78. When a few MDC staff members brought allegations of abuse to the attention of Hasty and other senior MDC officials, they were called snitches, threatened, and subjected to harassment by many other staff members at the facility. The campaign of harassment was so pervasive that one MDC employee estimated that half of the staff at MDC stopped speaking to him after he wrote a confidential memo to the Warden detailing detainees' complaints that was then distributed to the staff members on the ADMAX unit. The harassment went unpunished.

COMMUNICATIONS BLACKOUT AT MDC

Policy to Hold Detainees Incommunicado

79. Hasty implemented Ashcroft, Mueller, and Ziglar's explicit policy to limit MDC Plaintiffs' and class members' access to the outside world in several different ways. First, the 9/11 detainees were subjected to a communications blackout. MDC written policy (created by Lopresti and Cuciti, and approved by Hasty and Sherman) stated that the 9/11 detainees were not to be provided any social or legal visits or telephone calls. This blackout lasted until mid-October.

80. At the same time, individuals who sought to contact MDC plaintiffs and class members were rebuffed. The arrest, processing, and detention of the 9/11 detainees were shrouded in secrecy. Family members, friends, and attorneys of men who had suddenly disappeared had great difficulty finding out whether they had been arrested and detained, and if so, where they were being held. Once they were classified as "special interest

cases," 9/11 detainees' immigration hearings were closed, not only to the general public, but also to family members, and their case records were sealed.

81. MDC Plaintiffs and class members were classified within the BOP as "WITSEC" (Witness Security). The WITSEC designation is intended to protect cooperating witnesses from reprisal, and operates to prohibit BOP staff from disclosing to any individual, even a family member or lawyer, the designee's location. Based on the WITSEC designation, MDC staff repeatedly turned away any relative or lawyer who came to the MDC in search of a detainee by falsely stating that the detainee was not there.

82. For example, after Mehmood was arrested, his wife Uzma tried to find out what was going on by visiting the local police department, and calling the FBI. The FBI told her that Mehmood was in INS custody and gave her a phone number to call to ascertain Mehmood's location. When she called the INS, however, they would not tell her where her husband was being held. Eventually, she hired a lawyer who learned that Mehmood was being held at MDC. But even with the help of counsel, she was unable to communicate with her husband for three months.

Post-Blackout Restriction on Communication and Access to Counsel

83. Beginning around the middle of October 2001, MDC Plaintiffs and class members were theoretically permitted non-contact visits and telephone calls. By MDC policy, they were allowed one call per week to an attorney and one social call per month. In practice, they were frequently denied even these limited calls.

84. In many instances, the unit counselor inquired whether 9/11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "Are you okay?" Many detainees did not realize that an affirmative response to this casual question meant they opted to forgo their legal call for that week.

85. When MDC Plaintiffs and class members were actually offered calls, an MDC employee would bring a phone to each cell, often before offices opened for business, and each inmate who requested a phone call was required to place a call request form outside of his cell. Often, the officers would pretend to dial a number, or deliberately dial the wrong number and then claim that the line was dead or busy. They would then refuse to dial again, saying the call failed to go through and that the detainee had exhausted his quota of calls for the week or month. Legal calls that resulted in a wrong number, busy signal or calls answered by voicemail counted as their one legal call for that week. According to MDC documents, Hammouda, for example, was not able to make a legal call until November 7, and it appears the call was unsuccessful, as the records indicate it lasted only two minutes. His next opportunity was November 19, and when that call was incomplete, he was not given another opportunity until November 27. His call on that day lasted only five minutes. Similarly, Abbasi attempted a legal call on December 17, but it was incomplete. MDC records show that he did not try again until February 12, when he made a call that lasted three minutes. Khalifa made a legal call on October 15, but did not receive another opportunity until November 7. Bajracharya was not aware that he could make a legal call until December 3, 2001. On December 17, 2001 he again attempted to make a legal call, but MDC records show the

call was incomplete. He did not get another opportunity until January 4, 2002, at which point MDC records show that he made a phone call lasting two minutes.

86. Once the MDC Plaintiffs and class members were permitted social calls at MDC, in or about the middle of October 2001, these, too, were severely restricted in the same ways. Mehmood, for example, was not able to get through to his wife for three months, because the MDC employee responsible for providing phone calls counted an attempted call, even one that did not go through for technical reasons, as the one monthly call. Hammouda received his first social call on December 18. Abbasi was offered a social call for the first time on October 19, but the number he wanted to call was not on his inmate list, and thus he lost his opportunity to make any call that month. His next opportunity to make a social call was on November 13, but the call was not accepted. He didn't get another chance until December 26. Khalifa tried unsuccessfully to make a call on October 19, and did not try again until December 10. That attempt was also unsuccessful. Bajracharya was first able to attempt a social call on December 18, but that attempt was unsuccessful. Indeed, MDC records indicate that he was only able to complete one social call in his entire time at MDC, and that call lasted 4 minutes. MDC records show that Khalifa did not have a single successful social call. Benatta was only ever able to get through to an answering machine.

87. MDC Plaintiffs and class members were so upset by their lack of access to the outside world that many went on hunger strike to protest the situation, and one class member attempted suicide by strangling himself with his bed sheet.

88. Legal and social visits were non-contact; a detainee was separated from his visitor by thick plexiglass. Despite the lack of contact, MDC Plaintiffs and class members were cuffed and shackled throughout the visit, and strip-searched both beforehand and afterwards. Social visits were restricted to immediate family. Thus, Abbasi, Benatta, Bajracharya and Khalifa never received a single social visit throughout their imprisonment on the ADMAX.

89. December 17, 2001 was Eid, the Muslim holiday that marks the end of the Ramadan fast. Mehmood's wife and children went to MDC to visit him, but were told he was not there. They left without being able to see Mehmood, or deliver to him the prayer rug and food they had brought. Mehmood's wife was finally granted a non-contact visit on January 11, 2002. Mehmood's children were not allowed to visit until he was moved to the general population at MDC in February 2002.

90. Hammouda's wife had a similar experience. Twice she was turned away and told her husband was not at MDC. On another occasion she arrived at MDC at the time she had been instructed she could visit, and was told visiting hours were over. These troubles continued throughout the spring of 2002.

91. Demonstrations protesting the treatment of 9/11 detainees were held weekly outside the MDC starting in November, but the ADMAX SHU cell windows were painted over to keep the detainees from seeing the protestors.

92. The MDC Plaintiffs and class members were not provided with sufficient information to obtain legal counsel. Immigration detainees typically receive a list of or-

ganizations that provide free legal services, but the list given to 9/11 detainees was woefully inadequate, containing much inaccurate and outdated information. The MDC Plaintiffs and class members had great difficulty obtaining legal representation, and some were held for months following their arrest while their lawyers and their families made unsuccessful requests to learn their status and whereabouts.

93. Abbasi tried to secure counsel by calling names on the list of pro bono counsel provided by the facility, but got no response. He finally managed to contact his sister, Uzma, after about three months in detention. She arranged to secure an attorney to represent him with respect to his criminal charges. Once he retained an attorney, he was able to call that attorney for two to three minutes at a time, although MDC personal remained within hearing distance of his conversation at all times. He was not able to meet with an attorney until December 28, 2001. Khalifa's first legal visit was on November 1, 2001. The attorney he met with told him she would be at his immigration hearing, but when the time came, she was not present. He was unable to reach her after that. He tried calling some of the numbers on the pro bono counsel list, but was unable to reach anyone.

94. Some MDC Plaintiffs found their access to counsel blocked even during immigration hearings. Mehmood had a hearing before an immigration judge at MDC on October 16. When he explained to the judge that he had been unable to contact a lawyer, the judge postponed the hearing until October 25, 2001.

95. Benatta also had to attend an immigration hearing without a lawyer. In fact, he didn't even know he was going to have a hearing until he was ordered out of his cell

by MDC guards and taken before an immigration judge. During that hearing, Benatta complained to the immigration judge about how tightly he was restrained, so the judge asked the corrections officers to check him during a break. The guards pulled Benatta's chains even tighter, and asked him if he wanted to complain again. Benatta also told the immigration judge that he was being denied phone calls. Word of his complaint got back to MDC staff, and resulted in even more restricted access.

96. While civil liberties, civil rights, and immigrant advocacy organizations sought to provide free legal services to 9/11 detainees, the MDC substantially limited such organizations' access to 9/11 detainees by order from DOJ headquarters, in keeping with Ashcroft, Mueller and Ziglar's policy to isolate the detainees. MDC employees as well as others within the BOP and INS refused to disclose detainees' names, the facilities in which they were held, or information about their cases. They also denied requests by civil liberties, civil rights, and immigrant advocacy organizations to visit BOP facilities or county jails to screen 9/11 detainees in need of legal assistance. These requests were considered and rejected at Main Justice.

97. These unnecessary restrictions led to repeated complaints by 9/11 detainees, some of which were brought to the attention of Hasty, Zenk, Sherman, Lopresti, and Cuciti. The interference was also documented in legal call and social call logs prepared by MDC staff for review by Hasty, Zenk, Sherman, and Lopresti.

Video and Audio Taping Attorney/Client Conversations

98. In deliberate violation of the law, Hasty ordered his subordinates, including the other MDC De-

fendants, to audiotape detainees' visits with their attorneys. Such recording of inmates' meetings with attorneys (which was done by using a videotape camera that also recoded sound) is specifically prohibited by 28 C.F.R. § 543.13(e), which provides, "Staff may not subject visits between an attorney and an inmate to auditory supervision."

99. Recording the detainees' attorney visits was not necessary for the MDC's security purposes. It violated the law and interfered with the detainees' access to effective assistance of counsel. Through April 2002 or later, attorney visits were recorded with sound. Repeatedly throughout November and December, MDC staff brought to Hasty's attention the fact that "silent witness" cameras might be substituted for audio-ready cameras, but this advice was not heeded.

Policy to Deny Detainees Access to Consuls

100. The WITSEC designation and communications restrictions also made it difficult for consulates to contact detainees who were citizens of their countries.

101. Though non-citizen immigration detainees must be advised of their right to seek assistance from their consulates under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, TIAS 6820, 21 U.S.T. 77, many Plaintiffs and class members were not advised of this right. Others were coerced into signing forms they did not understand, waiving that right. When the MDC Plaintiffs and class members sought to contact their consulates, their requests were repeatedly denied by the MDC Defendants.

102. For example, Hammouda was not informed that he had the right to have his consulate told about his de-

tention until June 2002. At one point, he tried to call his consulate, but the number provided to him by MDC staff was incorrect. Abbasi was never informed of his right to call his consulate. While at the INS's Varick Street detention facility, he asked to speak to a lawyer or his consulate, but was not allowed to do so.

INHUMANE CONDITIONS OF CONFINEMENT AT MDC

103. Confinement in the ADMAX SHU subjected the MDC Plaintiffs and class members to a system of conditions designed to make their lives difficult and painful, not for any legitimate penological reason but in the belief that they were probably terrorists who therefore ought to suffer, and in the hopes that this suffering would lead to their cooperation with law enforcement. These conditions included confinement to bare cells virtually 24 hours a day; denial of recreation; deprivation of sleep; arbitrary strip-searches; chains, handcuffs and leg cuffs, coupled with twisting their hands and arms and stepping on their leg chains, whenever they left their cells; constant insult; denial of a chance to practice their religion; and lack of access to the prison handbooks that explained how to file complaints about such mistreatment.

Restraints and Abuse

104. During transport between the MDC Receiving and Discharge Area ("R&D Area") and the ADMAX SHU on the ninth floor of the MDC, 9/11 detainees at the MDC were fully restrained in metal handcuffs attached to a waist chain that was connected to another chain linked to ankle cuffs. Similarly, during routine escorts on the ADMAX SHU, the detainees were handcuffed behind their backs and their ankles were shackled. When they were escorted to visits, interviews, or out of the MDC, the detainees were handcuffed in front, restrained in a waist

chain, and placed in leg restraints. The MDC Defendants subjected all MDC Plaintiffs and class members to such restraints routinely, as a matter of policy. In addition, MDC Defendants kept all MDC Plaintiffs and class members confined to their cells for nearly 24 hours a day almost every day while they were housed in the ADMAX SHU.

105. Physical abuse of the MDC Plaintiffs and class members during transport was routine. Abuse was more flagrant before the MDC began videotaping detainee escorts in early October 2001, but continued even after that time, and included:

a. Slamming detainees against walls during escorts, including when they first arrived and on the way to attorney and doctor visits and recreation. Upon arrival to the MDC, staff slammed 9/11 detainees against the wall and pushed their faces into a t-shirt hanging on the wall which displayed the slogan "These Colors Don't Run" and the American flag.

b. Bending or twisting detainees' arms, hands, wrists, and fingers.

c. Lifting detainees off the ground by their arms, and pulling on their arms and handcuffs.

d. Stepping on detainees' leg restraint chains, both while stationary and while walking.

e. Using physical restraints as a form of punishment by leaving them in a cell in restraints for no proper penological purpose.

f. Handling detainees in various other rough and inappropriate manners.

106. Plaintiffs and class members were always fully compliant, making any use of force unnecessary and against BOP policy. Incidents of detainee misconduct were rare, and included only peeling paint off walls, injuring themselves, hiding from cameras, or refusing to come to the cell door to be handcuffed.

107. Numerous complaints about abuse of 9/11 detainees at MDC led the BOP to institute a policy of videotaping all 9/11 detainee movements and resulted in two OIG investigations, as well as investigations by the BOP Office of Internal Affairs and the FBI. Despite his awareness of these complaints and investigations, Hasty failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the tapes for abuse. Many of these tapes were destroyed, disappeared, or were taped over, and others were withheld from the OIG for years before they were "found" by MDC staff.

108. Typically, medical staff failed to examine or even comment on injuries the 9/11 detainees received from staff, or to ask how they occurred. MDC Plaintiffs and class members were never given an opportunity to speak to medical personnel outside the hearing of the correctional officers who abused them; these officers sat in on medical consults, and on occasion even assisted the doctors. It was the practice of the medical staff not to report abuse by correctional officers, and the MDC Plaintiffs and the class members often did not ask for doctors when they were abused for fear of retaliation by those officers.

109. MDC staff verbally abused Plaintiffs and class members by referring to them as "terrorists," and other offensive names; threatening them with violence; cursing at them; insulting their religion; and making humiliating

sexual comments during strip-searches. These instances of abuse were themselves the result of Hasty labeling the detainees as "terrorists" in MDC memoranda despite the lack of any connection between class members and terrorist activity.

110. Some MDC Plaintiffs and class members complained about this abuse. For example, on February 11, 2002, Hammouda and several other class members complained to the MDC counselor that MDC staff called them "camel," gave them the finger, and assaulted them. No action was taken on these complaints. The counselor who reported the complaint to the Warden was ostracized and harassed.

Arbitrary and Abusive Strip-Searches

111. While Defendant Cuciti was given responsibility for developing the strip-search policy on the ADMAX, that policy was never put in writing, and the searches were conducted inconsistently.

112. 9/11 detainees were strip-searched upon arrival to MDC at the R&D Area and again after they had been escorted, in handcuffs and shackles and under continuous guard, to the ninth floor ADMAX SHU. Some of the same officers who were present for a detainee's strip-search in R&D were present for the detainee's strip-search on the ADMAX SHU. Detainees were strip-searched every time they were removed from or returned to their cell, including before and after meeting with a lawyer, receiving medical care, attending a court hearing within the MDC, or being transferred to another cell. These strip-searches occurred even when they had no conceivable opportunity to obtain contraband, such as before and after non-contact attorney visits which they had

been escorted to and from while handcuffed and shackled and under continuous four-man guard, and before and after being transferred directly from one cell to another. For example, on October 25, 2001, Mehmood had an immigration hearing and a noncontact legal visit at MDC. Thus, he was strip-searched four times that day. Similarly, Benatta was strip-searched both before and after an FBI interview, even though he was transported in full restraints by five MDC staff members from his locked cell to the bare FBI interview room and back without the opportunity to receive contraband. The strip-searches had no rational relation to any legitimate penological objective.

113. At other times 9/11 detainees were subjected to random strip-searches, despite remaining within their locked cells without opportunity to receive contraband. For example, MDC records indicate that Benatta was strip-searched on September 23, 24, and 26 of 2001, although he was not transported out of his cell on any of those days.

114. Many, though not all, of these illegal strip-searches were documented in a "visual search log" created by MDC staff for review by MDC management, including Hasty. Other illegal searches were captured on videotape.

115. Strip-searches were employed by MDC staff as punishment and used to humiliate the MDC Plaintiffs and class members, using such tactics as having female officers present, videotaping the strip-searches against BOP policy, strip-searching detainees unnecessarily and within view of other prisoners and staff, and making jokes and humiliating comments during strip-searches. On one occasion, a guard arrived in the middle of one of Benatta's

strip-searches, and joked with the other guards about how they should have let him know Benatta was being searched, so he could have been there for all of it. Another time, a female officer watched Benatta's search. For Hammouda, the searches were so traumatizing and humiliating that they ruined the few visits he was able to have with his wife. He was searched before and after seeing her, and officers made derogatory statements about his body and otherwise harassed him. Some of these searches were videotaped. The process made him feel damaged before talking to his wife, and rendered him anxious and depressed both before and after the visits. It was so bad that Hammouda considered telling his wife not to visit.

116. Many strip-searches conducted on the ADMAX SHU were filmed in their entirety and frequently showed the detainees naked, contrary to BOP regulations that required strip-searches to "be made in a manner designed to assure as much privacy to the inmate as practicable." One MDC videotape shows four officers escorting a 9/11 detainee into a recreation cell and ordering him to strip while the officers berate him for talking too much with other detainees and for encouraging them to go on a hunger strike. The detainee had just been taken from his cell, patsearched, and then escorted into the recreation cell by the four officers. There was no correctional purpose or justification for this strip-search.

117. On another occasion, MDC staff were ordered to strip-search all 9/11 detainees without suspicion or any opportunity to receive contraband in order to check to see if they had shaven genitalia, based on the mistaken belief that Muslims shave their genitals prior to performing

jihad. In fact, Muslims commonly shave their bodies for religious and hygienic reasons.

118. The strip-searches caused all of the MDC Plaintiffs and class members embarrassment and humiliation.

Sleep Deprivation

119. Until March 2002, bright lights were kept on in the cells of MDC Plaintiffs and class members 24 hours a day, depriving them of sleep. Prison rules forbade detainees to cover their heads while lying in bed at night, so there was no escape from the constant light. In addition, officers banged loudly on their cell doors to wake them up, interrupt their prayers, or generally harass them; sometimes this noise-making took place during required inmate counts at midnight, three and five a.m., but on other occasions it was without this excuse.

120. MDC staff have defended much of the noise as a necessary byproduct of "bar taps," a safety procedure in which correctional personnel use a mallet to tap on each bar in the facility weekly to produce a noise and check for stress or damage. MDC documents show that contrary to past MDC practice, bar taps on the ADMAX unit were conducted twice a night, in the middle of the night. On some occasions, correctional officers walked by every 20 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to America." Officers would also watch the in-cell cameras and kick on the doors as soon as they thought a detainee was asleep.

121. All the MDC Plaintiffs and class members experienced sleep deprivation, causing substantial physical and emotional distress. They complained repeatedly to officers, MDC management, and medical personnel, yet

received no relief. On one occasion, Hammouda complained that he couldn't sleep at night, and was given a sheet of paper advising him to avoid coffee.

De Facto Denial of Recreation; Inadequate Clothing and Exposure to the Elements

122. Until October 30, 2001 MDC Plaintiffs and class members were denied all recreation. After October 30, Plaintiffs and class members were offered "recreation" in empty cages on the ADMAX range. The cages were devoid of any exercise equipment and open to the sky. Thus they were exposed to the elements, including rain and, in the winter, snow and freezing cold. The MDC Plaintiffs and class members were often offered transport to these recreation cells at the early hour of six or seven a.m., but denied any extra clothing besides their light cotton prison garb, and, during the dead of winter, a light jacket. Detainees who accepted these offers were often physically abused along the way by MDC officers who escorted them and were sometimes left for hours in the cold recreation cell, over their protests, as a form of punishment.

123. Thus, while "recreation" was nominally offered several times a week, the MDC Plaintiffs and class members were constructively denied exercise during the fall and winter months. For example, MDC records show that on November 8, 2001, only 13 of the 46 9/11 detainees who were offered recreation accepted recreation. Two days later, on November 10, 2001, 11 9/11 detainees initially requested recreation, but all but two of them changed their minds when the time came, based on the cold wind that was blowing through the unit. MDC records indicate that the entire range was so cold that day, the officers wore jackets inside. Recreation was offered

again on November 13, but again, only two detainees accepted due to the cold.

124. Bajracharya, for example, almost always refused recreation. MDC records show that one of the few times he chose to visit the recreation cages was December 28. 2001 at 8:45 in morning. He was left out in the elements with only a thin coat until 11am, despite the fact that it was below freezing that day.

125. Khalifa was one of the few 9/11 detainees who frequently accepted recreation, despite the cold, because getting to breathe fresh air was the closest he could get to feeling free. His acceptance of recreation did not please the MDC guards, so they chose a cold day, and left him outside in the recreation cage in the freezing cold for four hours, with only a thin jacket. He knocked repeatedly at the door and asked the guards to get him, but they merely laughed at him. When he was finally brought back to his cell, he was shaking and could not feel his feet.

126. MDC staff documented Plaintiffs' and class members' consistent rejection of the opportunity for "recreation" in ADMAX SHU Reports created for review by MDC management, including Lopresti and Sherman. Despite receiving many complaints about the cold, Hasty decided not to issue warmer clothing to the 9/11 detainees, and decided that recreation would continue to be offered only in the chilly early morning.

127. Throughout the fall and winter, even the cells of the MDC Plaintiffs and class members were extremely cold. The MDC Plaintiffs were denied sweaters, jackets, other warm clothing, or bedding adequate to keep them warm. Throughout this period, MDC staff on the AD-

MAX unit frequently wore jackets while inside to keep warm.

Lack of Hygiene Items and Provision of Inadequate and Unhealthy Food

128. The MDC Plaintiffs and class members were deliberately denied adequate, healthy, and religiously appropriate food. Meals in the ADMAX SHU were meager and barely edible, leaving the MDC Plaintiffs hungry.

129. Contrary to the usual policy for inmates in administrative segregation, MDC Plaintiffs and class members were denied all access to the commissary, pursuant to a written MDC policy created by Cuciti and Lopresti, and approved by Sherman and Hasty. Nor were they allowed to retain anything, even an extra apple, in their cells.

130. MDC Plaintiffs and class members were also denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, eating utensils, personal reading glasses, and a cup for drinking water, pursuant to a written MDC policy created by Cuciti and Lopresti, and approved by Sherman and Hasty. Under the policy, hygiene items were passed out and then retrieved daily. Thus for the first several months of their detention, the MDC Plaintiffs and class members were not allowed to keep toilet paper, a towel, soap, a toothbrush, a cup, or other personal hygiene items in their cells, making it difficult to maintain proper health and hygiene, contrary to religious dictates and personal dignity. This policy was created for the 9/11 detainees, and had never been imposed on inmates in administrative or disciplinary segregation at MDC before.

Deliberate Interference with Religious Rights

131. MDC and Passaic Plaintiffs and class members were consistently burdened in their attempts to practice and observe their Muslim faith.

132. Soon after their arrival at MDC, Plaintiffs requested copies of the Koran, but did not receive them until weeks or even months later, pursuant to a written MDC policy (created by Cuciti and Lopresti, and approved by Hasty and Sherman) that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell. Abbasi recalls that it was weeks before he received a Koran, and Hammouda and Mehmood did not receive one until a month after they were each detained. Benatta requested a Koran during the first several weeks of his detention, and never received one.

133. While detained in the ADMAX SHU, MDC Plaintiffs and class members were all denied the Halal food required by their Muslim faith, despite many requests for a Halal diet. MDC Plaintiffs and class members often chose not to eat the main part of their meals because they could not identify the type of meat it contained. This exacerbated the hunger caused by their already meager meals, and as a result, they were hungry almost every day of their confinement at MDC. Mehmood brought his religion to the attention of MDC staff as early as November 30, 2001, yet he was not cleared for a Halal diet until February 26, 2002. Abbasi never received Halal food in the ADMAX.

134. There was no clock visible to the 9/11 detainees, and MDC staff refused to provide them the time of day so that they could pray at the proper times. The staff also

refused to tell 9/11 detainees the date, making it difficult for them to know when Ramadan began.

135. MDC Plaintiffs and class members were sometimes disciplined for not responding to a prison count because they were in the midst of their prayers. Hammouda, for example, received an incident report for refusing to stand up for count. He filed a grievance over this report, explaining that he needed to finish his prayer, and stood up as soon as he was done. As a result of the incident, he was prohibited from social visits for sixty days.

136. MDC staff frequently interrupted MDC Plaintiffs' and class members' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping, and telling them to "shut the fuck up" while they were trying to pray. Staff also mocked the detainees' prayer by attempting to repeat the Arabic phrases of the Azan (the call to prayer) loudly. One MDC guard frequently yelled "Jesus" whenever he heard the opening phrases of the Azan.

137. Evidence and complaints about these practices were brought to the attention of MDC management, including Hasty.

138. At Passaic, the policy to deny detainees the ability to practice their religion was implemented similarly. There too, guards disrupted prayer time by yelling and making noise. For example, guards would purposely wait until the detainees were praying to hand out razors and other hygiene supplies.

139. Detainees at Passaic were denied Halal food as well. For example, when Turkmen requested Halal food,

the guard replied "This is not a hotel, this is a prison." The request was otherwise ignored.

Failure to Provide Handbooks

140. The usual channels for filing complaints of mistreatment were cut off at MDC. MDC handbooks which explained how to file complaints about mistreatment were not given to the MDC Plaintiffs and class members on a timely basis, if at all. Abbasi, for example, did not receive the MDC handbook until May of 2002. Some MDC Plaintiffs and class members, including Abbasi, received a short two-page explanation of policies at the ADMAX SHU, but that document did not include any information about making complaints, and was confiscated by MDC staff shortly after it was provided. By putting them in the extremely isolated ADMAX SHU, imposing a communications blackout, and shutting down their ability to file complaints, MDC Defendants blocked MDC Plaintiffs' and class members' access to normal channels for lodging complaints of abuse and mistreatment.

ALLEGATIONS CONCERNING INDIVIDUAL PLAINTIFFS

Ahmer Iqbal Abbasi

141. Abbasi entered the United States in 1993 with a visitor visa, and subsequently sought political asylum from his native country of Pakistan. He remained in the United States unlawfully after that application was denied, only traveling one time in 1998 for a short trip to Pakistan. He drove a cab in Manhattan and saved up to purchase a small grocery store, which he sold prior to 2001.

142. Abbasi was arrested by the FBI on September 25, 2001. At the police station, he was interviewed at length by FBI, INS and NYPD officers. The officers asked Abbasi about his religious beliefs and practices.

143. Abbasi was not told why he was being arrested. He later learned that he came to the attention of the FBI because a house guest had presented a false social security card at the New Jersey Department of Motor Vehicles. The FBI became interested in Abbasi based only on the report that the card, and a passport, had been left by "a male possibly Arab" using Abbasi's address. Based on this information, and nothing more, Abbasi was held as "of interest" to the PENTTBOM investigation, and detained in maximum security confinement until cleared of any connection to terrorism.

144. On September 26, Abbasi was taken to the INS Varick Street detention center. He acknowledged that he had entered into a fraudulent marriage for the purpose of obtaining a green card, and stated that he would like to be deported. Abbasi was previously ordered removed and thus did not receive any immigration hearings. Abbasi could have been removed by the INS within weeks; instead, he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

145. On the afternoon of September 27, 2001 Abbasi was transported to MDC by the INS "Special Response Team" in a convoy of INS and NYPD vehicles. The Special Response Team members wore full body armor with helmets and goggles. The convoy used sirens, and the streets were shut down. Once at MDC, Abbasi was placed in the ADMAX SHU.

146. The conditions of Abbasi's confinement were harsh. Like the other MDC Plaintiffs and class members, Abbasi was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to the outside world, counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Abbasi was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Abbasi was not provided with timely notice of MDC's complaint procedures.

147. Whenever Abbasi was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by tightening his handcuffs and shackles so much that he periodically lost feeling in his fingers and thumb. He was beaten upon arrival at MDC, and systematically shoved into the wall upon later transports. Despite the pain, Abbasi offered no resistance, fearing that resistance would only make matters worse. In early October, MDC staff began video-recording his transports, and the physical abuse lessened then to some degree. The guards were also verbally abusive, and referred to Abbasi and the other detainees as "fucking Muslims" and "terrorists."

148. These conditions were completely without penological justification, as no one at the FBI or the BOP had any reason to suspect that Abbasi was dangerous or connected to terrorism. The FBI never developed any evi-

dence to tie Abbasi to any terrorist activity, or indicate that he might be dangerous. Indeed, the only reason Abbasi was ever suspected of a connection to terrorism was his identity as a Muslim from Pakistan.

149. On October 2, 2001, SIOC at FBI Headquarters sent an electronic communication to the New York field office requesting information about Abbasi and other detainees. SIOC instructed the New York office to state whether the FBI had an investigative interest in Abbasi, describe the basis for the initial interest, supply specific information justifying continued interest or non-interest, and provide supporting documentation. It does not appear that the New York field office provided any information in response to this request.

150. On October 15, 2001, Abbasi was interviewed at MDC by a team of INS, FBI, and NYPD officers. He was asked if he could provide information regarding September 11, and questioned about his immigration status and his marriage. This was the last time Abbasi was questioned by the FBI. In January, he was interviewed again by the INS regarding his marriage. None of these interviews developed any information tying Abbasi to terrorism or indicating that he might be dangerous.

151. By November 1, 2001, Abbasi had been cleared by the New York field office of any connection to terrorism. On that day, SIOC requested CIA name traces on over one hundred detainees, including Abbasi, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. FBI Headquarters indicated that these detainees would probably be released within seven days. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them

that Abbasi, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision.

152. Over three months later, on February 7, 2002, Stephen Jennings, Acting Chief of the International Terrorism Operations section of the FBI's Counterterrorism Division, told Michael Pearson, Executive Associate Commissioner of the INS, that, after consultation with FBI Headquarters, the FBI had no investigative interest in Abbasi in connection to the PENTTBOM investigation. Mr. Jennings said that Abbasi could thus be removed from the INS's custody list. Abbasi was moved from the ADMAX SHU to the general population at MDC on February 14, 2002.

153. On February 26, 2002, Abassi was charged with three criminal offenses, including fraudulent marriage, falsification of a social security card, and credit card fraud. He pled guilty to these offenses in June of 2002, and was sentenced to time served. He was deported on August 20, 2002.

154. Abbasi continues to suffer the emotional and psychological effects of his detention in the United States.

Anser Mehmood

155. Anser Mehmood was born in Lahore, Pakistan on January 12, 1960. He moved from Pakistan to the United States with his wife, Uzma, and three children in 1989. Uzma is Abbasi's sister. Mehmood entered the United States on a business visa and stayed after that visa expired. The family lived in Bayonne, New Jersey, and Mehmood's fourth child was born there in 2000. In May of 2001, Uzma's brother—a United States citizen—submitted an immigration petition for the entire family.

156. Mehmood used the money he made selling his successful business in Pakistan to start a trucking business which he operated on contract with a freight moving company based in Ohio. He was successful and saved enough money to purchase a house in New Jersey and send money home to his family in Pakistan. His children attended public school and adjusted well to life in the United States.

157. On the morning of October 3, 2001, Mehmood was asleep with his wife and year-old son. A team of FBI and INS agents knocked on his door. The agents searched their home and questioned Mehmood and his wife about their immigration status and their relatives, and showed them pictures of individuals who they did not recognize. The agents also asked him whether he was involved with a jihad. Mehmood acknowledged that he had overstayed his visa, and showed the agents the social security number he was using to work.

158. Mehmood's arrest was a still more remote result of the FBI investigation of the lead that led to Abbasi's arrest—that "a male possibly Arab" left a fake social security card and passport at the New Jersey DMV. While investigating Abbasi, the FBI found the name of his sister Uzma. They came to the house to speak to her, not Mehmood.

159. The FBI told Mehmood they had no interest in him, but that they had to arrest Uzma, as they were interested in learning information from her about another brother, still living in Pakistan. Mehmood convinced the FBI to arrest him instead of Uzma, who was still breastfeeding their infant. The agent told Mehmood that they had no choice but to arrest one of the parents, but that

Mehmood faced a minor immigration violation only, and he would be out on bail within days.

160. Mehmood was handcuffed and placed in a car with several INS officers, who transported him to the INS Varick Street detention center, where he was placed in a cell with several other Pakistani and Arab men who had also overstayed their visas. Later that day, he was placed in handcuffs and shackles and put in a van with three other men, flanked on either side by FBI vehicles, which blocked off the side roads as they drove to the Metropolitan Detention Center.

161. Mehmood was charged with overstaying his visa. On October 25, 2001 he was denied bond and political asylum. On December 5, 2001 he was ordered removed. He appealed, but this appeal was subsequently withdrawn. Throughout this period, he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

162. Mehmood's time in the ADMAX SHU at MDC was harsh. His abuse began the moment he entered MDC on October 4, 2001. He was dragged from the van by several large corrections officers, who threw him into several walls on his way into the facility. His left hand was broken during this incident and remained swollen for some time afterward. He later learned that he sustained neurological damage in his hand and hearing loss. Mehmood was photographed, and then re-photographed after MDC guards cleaned the blood from his mouth. The guards threatened to kill him if he asked any questions. One asked if he knew why he was at MDC. He responded that he was there for overstaying his visa. The guard disagreed, and said he was there for the attack on the World Trade Center.

163. Mehmood was then transported in handcuffs and shackles to the ADMAX SHU, and placed in a cell with a man named Ashraf.

164. The family's neighbors learned that Mehmood had been arrested through media reports, and began harassing the family. Mehmood's children were isolated and taunted at school. Uzma could not support the family without his financial contribution, and eventually, in February of 2002, Uzma and the children were forced to return to Pakistan.

165. The conditions of Mehmood's confinement were harsh. Like most if not all of the other MDC Plaintiffs and class members, Mehmood was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Mehmood was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Mehmood was not provided with timely notice of MDC's complaint procedures.

166. Whenever Mehmood was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by banging him into the wall, dragging him, carrying him, and stepping on his shackles and pushing his face into the wall. They were also verbally abusive, and stated that Mehmood was responsible for 9/11, so they would do to him what he did on that day. He

also witnessed correctional officers make ethnic and religious slurs to other 9/11 detainees.

167. These conditions were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Mehmood of connection to terrorism or posing a danger. The FBI never developed any evidence to tie Mehmood to any terrorist activity or indicate that he might be dangerous. Indeed, the only reason Mehmood was ever suspected of a connection to terrorism was his identity as a Muslim from Pakistan.

168. Mehmood was never interviewed by the INS or the FBI after his arrest. According to FBI documents, Mehmood was of interest because he refused to accept a "lucrative transportation assignment" on September 11, 2001. However, by November or December of 2001, the FBI agent investigating Mehmood had determined that his refusal was ordered by the trucking company he did contract work for, due to the turmoil following September 11, and that Mehmood should be deported. On November 1, 2001, Mueller requested CIA name traces on dozens of detainees, including Mehmood, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Mueller indicated that the detainees would probably be released within seven days.

169. Despite these indications, a December 17, 2001 list of FBI interest detainees maintained at FBI headquarters stated that Mehmood was "of interest" to the FBI. Mehmood's clearance at FBI Headquarters was "pending" by January 16, and finalized by January 30, 2002.

170. On February 6, 2002 Mehmood was moved to the general population in MDC. He was told that he would be deported shortly. It appears from FBI documents that this action was not based on Mehmood's clearance, but rather on a motion by his attorney to have him moved out of segregation. On March 29, 2002 he was charged with working with an unauthorized social security number. He pled guilty and was sentenced to eight months in prison. On April 4, 2002 he was transferred to Passaic County Jail, in New Jersey. He was deported to Pakistan on May 10, 2002.

171. Mehmood continues to suffer the emotional and psychological effects of his detention in the United States. Mehmood lost his home and business due to his detention, and has had trouble finding work in Pakistan.

Benamar Benatta

172. Benamar Benatta, a citizen of Algeria, initially entered the United States on a nonimmigrant visitor visa on December 31, 2000. Benatta was then a member of the Algerian Air Force, and came to the United States to receive aviation training at a Northrop Grumman training facility. Benatta completed that training program, but remained in the United States past the expiration of his visa with the goal of seeking political asylum and gaining employment in this country. On September 5, 2001 he crossed the Canadian border with false documentation and applied for refugee status.

173. Benatta was detained by Canadian authorities for investigation. The day after the September 11 attacks, Canadian authorities alerted authorities in the United States to Benatta's profile and presence in Canada and transported him, against his will, back to the United

States, where he was taken into custody by the INS. Benatta was detained for several days at the Rainbow Bridge port of entry in Niagara Falls, New York, where he was interrogated by the FBI regarding his false identification. A detailed summary of this interview was sent by electronic communication to SIOC, along with copies of investigatory notes by Canadian and US immigration officials and photocopies of the documents taken off Benatta.

174. The INS immediately commenced removal proceedings against Benatta based on his visa overstay and transferred him to Batavia Federal Detention Facility (BFDF). At BFDF, Benatta was served with a Notice to Appear at the Immigration Court in Batavia, New York on September 25, 2001. However, on September 16, 2001, before Benatta could retain or confer with counsel, he was transported to MDC in Brooklyn.

175. Benatta was transferred to MDC on a private jet, without explanation. He was one of the first detainees in the brand new ADMAX SHU, and thus there were no others to explain to him what was happening. He was placed in the ADMAX SHU with nothing—no toilet paper, toothpaste, a toothbrush, or shoes. To protest his conditions he went on a seven day hunger strike. He began eating again after MDC staff told him he would be force fed, and described how they would stick a tube down his throat.

176. The conditions of Benatta's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Benatta was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and

subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Benatta was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Benatta was not provided with timely notice of MDC's complaint procedures.

177. Whenever Benatta was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately kicking Benatta's manacles and shackles into his lower body. Despite the pain, Benatta offered no resistance, fearing that resistance would only make matters worse.

178. Benatta's only consistent access to the outside world was the view from one small window. Even that was taken away when MDC officials painted over the window, to further punish Benatta and the other detainees. On April 6, 2002, Benatta received an incident report for attempting to scrape the frosting of his cell window so he could see the outside world. After that incident report, MDC guards ordered Benatta to apologize to them, and retaliated against him by taken his blanket at night. The guards did this several times, and also once punished Benatta by taking his dinner.

179. Benatta's detention in harsh conditions had a profoundly deleterious impact on his health. Twice, Benatta attempted to injure himself due to his distress over the inexplicable, prolonged, and arbitrary confinement.

180. On October 6, 2001, Benatta's cellmate was removed for a medical emergency. Benatta was transferred to a recreation cage and was observed there banging his head into the concrete wall. MDC staff did nothing to stop him, nor did they seek psychological treatment for Benatta after this incident.

181. The lights were left on in his cell for 24 hours a day and guards banged on the walls and made loud noises in the night to keep him from sleeping. When Benatta tried to cover his face with a blanket to sleep, the guards ordered him to remove it. Benatta was unable to sleep for days at a time due to this abuse. On November 27, 2001 Benatta was left out in a recreation cage for two hours. The temperature that morning was in the 40s, and it was cloudy. When he was brought back inside, he requested a visit from the staff psychologist for sleep deprivation. After speaking to Benatta for five minutes through the door of his cell, the psychologist stated that Benatta was fine, and left.

182. The next day, November 28, 2001, Benatta asked to speak to the psychologist again. One hour later, one of the guards observed Benatta looking out his cell door window and refusing to respond to the guard's statements. Twenty minutes after that Benatta's cellmate, Khalifa, sounded his distress alarm to alert the guards that Benatta was attempting to hurt himself by banging his head against the bars of his cell. Benatta does not remember what he was thinking, or whether he was trying to kill himself. He just snapped. The next thing he knew, several MDC guards entered his cell, jumped him, threw him to the floor and began beating and kicking him. Benatta believes that it was during this incident that he chipped his tooth. He was forcibly extracted from his

cell by MDC guards and carried to a solitary strip cell, where he was tied tightly to a metal bed, without a mattress, and left for over four hours on suicide watch. He was subsequently released from four-point restraints and placed in ambulatory restraints for another two hours. At no point on that day nor afterwards was he removed from the unit for psychological treatment or a physical examination. From that day forward, Benatta was kept in a cell alone.

183. Benatta had several immigration hearings at MDC. On December 12, 2001, an INS attorney gave the immigration judge a document from the FBI's Counterterrorism Unit in Washington, which stated that Benatta was "of interest" to the FBI. The judge ordered him removed to Canada or, in the alternative, to Algeria. Although Benatta would have accepted removal to Canada, he appealed his removal order because the FBI officers who interrogated him threatened to have him put on a military jet and sent to Algeria, where Benatta feared execution. Benatta did not have the assistance of counsel in writing his appeal, or access to any assistance or law books. He did not even have use of a pen for longer than ten minutes. That appeal was dismissed on April 8, 2002.

184. Benatta's conditions of confinement were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Benatta of connection to terrorism or posing a danger. The FBI never developed any evidence to tie Benatta to any terrorist activity or indicate that he might be dangerous. Indeed, the only reason Benatta was ever suspected of a connection to terrorism was his identity as a Muslim from Algeria.

185. Benatta was interrogated by the FBI several times during his detention at MDC. He was questioned

about his religious practices and beliefs, his citizenship, and his Algerian Air Force employment. On September 29, 2001, information about Benatta, gleaned from an FBI interview at MDC on September 23, 2001, along with other interviews and investigation, was sent to SIOC from the New York FBI field office.

186. On October 1 and 2, 2001 SIOC sent electronic communications to the New York field office requesting information about Benatta and other detainees. As with Abbasi, SIOC instructed the New York field office to state whether the FBI had an investigative interest in Benatta, describe the basis for the initial interest, supply specific information justifying continued interest or non-interest, and provide supporting documentation.

187. The New York field office did not respond with any affirmative statement of interest or any information regarding Benatta's potential ties to terrorism. Despite this, at some point in late 2001 Benatta was identified as "of special interest" by the Joint Terrorism Task Force, and one summary of the FBI's investigation into Benatta includes information from an MDC intelligence memo indicating that Benatta is suspected of ties to terrorist organizations. There is no indication of what this alleged suspicion was based upon, nor any supporting details. As early as November 2, 2001, the FBI agent assigned to Benatta's case determined that he was of no interest to the PENTTBOM investigation.

188. On November 5, 2001 the New York Field office indicated their investigation was complete by submitting Benatta's name to SIOC for FBI Headquarters to request a CIA name trace and officially clear him. Benatta was officially cleared of any connection to terrorism at FBI Headquarters on November 14, 2001. Both the FBI's

New York field office and SIOC were aware that Benatta was not of interest to the PENTTBOM investigation, and information about Benatta's clearance was also available to officials in the Bureau of Prisons, and at the MDC. Despite this, until April 30, 2002 when he was transferred to general population, he remained in extremely restrictive conditions in the ADMAX SHU.

189. On May 3, 2002 SIOC sent another electronic communication to the New York field office again requesting information about whether the FBI had an interest in Benatta. The New York Field office responded on May 15, 2002 that they had no investigative interest in Benatta.

190. On December 12, 2001 Benatta was indicted in the Western District of New York for possession of a false social security card and a false alien registration receipt card. Despite a magistrate judge's order to "arrest Mr. Benatta, and bring him forthwith to the nearest Magistrate Judge" to answer the indictment, Benatta was not arraigned, nor brought before any magistrate, until April 30, 2002.

191. On September 12, 2003 United States Magistrate Judge Schroeder recommended dismissal of both of the counts against Benatta, holding that Benatta's detention in MDC was criminal in nature, and violated his Sixth Amendment right to a speedy trial. *See United States v. Benatta*, No. 01-CR-247E, 2003 U.S. Dist. LEXIS 16514 (W.D.N.Y. Sept. 12, 2003). Judge Schroeder determined Benatta was in criminal detention because of his transfer from INS custody, against INS procedures, and without immigration justification, as well as his assignment of a United States Marshall Service number, his extremely restrictive conditions of confinement, and his repeated

interrogations by the FBI. Judge Schroeder described Benatta's detention as a "subterfuge" and "sham," created to hide the reality that, because Benatta was an "Algerian citizen and a member of the Algerian Air Force, [he] was spirited off to the MDC Brooklyn . . . and held in the SH[U] as 'high security' for the purposes of providing an expeditious means of having [him] interrogated by special agents of the FBI. . . . " *Id.* at 25. The judge held that Benatta was "primarily under the control and custody of the FBI" from September 16, 2001 until April 2002, and that accepting the United State's claim that Benatta "was being detained by the INS during that period of time, for the purpose of conducting removal proceedings would be to join in the charade that has been perpetrated." *Id.* at 30.

192. Benatta remained in the United States in immigration detention while he continued to seek political asylum. He was transferred to Canadian custody in 2006 and sought refuge status there. He was granted refugee status from Canada in 2007, and his application for permanent resident status is currently pending.

193. Benatta continues to suffer the emotional and psychological effects of his seven and a half month detention in the ADMAX SHU. He has been diagnosed with post-traumatic stress disorder and has seen a therapist and tried different medications periodically since his release. He has trouble concentrating and writing, and is pessimistic about his chances in school or in a career. He is isolated from family and friends and has trouble communicating and trusting others. He has been unable to get a job, in part because no one will hire him after learning about his time in detention.

Ahmed Khalifa

194. Ahmed Khalifa entered the United States on July 16, 2001 on a student visa. Khalifa had completed five years of a six year program toward a medical degree at the University of Alexandria in Egypt. He planned to return to Egypt to complete the degree, and had a return ticket to Egypt for October 15, 2001. While in the United States, he worked for approximately six weeks at a clothing store. After that, he started working at a deli. He worked at both places without authorization.

195. Khalifa came to the attention of the FBI after the husband of a postal service worker reported a tip to the FBI hotline stating that several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money.

196. On September 30, 2001, Khalifa was home at the apartment he shared in Brooklyn with several Egyptian friends when there was a knock on the door. He opened the door to find over ten FBI, INS and NYPD officers. One FBI agent asked Khalifa for identification, and Khalifa showed him his international travelers / student ID. The officers searched his wallet, and appeared to be very interested in a list of phone numbers of friends in Egypt.

197. The officers searched the apartment without consent. One FBI agent asked Khalifa about his roommates by name. They asked for his passport, and asked if he had anything to do with September 11. One of the FBI agents told Khalifa that they were only interested in three of the roommates, but another agent interrupted, and said they also needed Khalifa. An FBI agent asked an INS agent to arrest Khalifa for working without authorization. He was then handcuffed, and placed in a

vehicle. They drove to the work places of Khalifa's other two roommates, who were not at home during the sweep, and arrested them as well.

198. Khalifa and the others were taken to the INS Varick Street detention facility, where they filled out some paperwork and were told they would be released after 24 hours. They were told not to contact their embassy otherwise it would mean trouble for them.

199. Khalifa was charged with working without authorization. On November 13, 2001, he was ordered removed from the United States. On that day, he waived his right to appeal the removal order because he thought accepting deportation would be the fastest way to get out of MDC. Khalifa could have been removed within days; instead he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

200. Khalifa was transported to MDC on October 1, 2001. The five roommates were all chained together by officers in combat gear and escorted in armored convoy to MDC. When the convoy passed by Ground Zero, one officer stated, "See what you've done."

201. Khalifa was processed at the ground floor of MDC. One employee took his glasses. He did not receive another pair for 90 days. He was slammed into the wall, pushed and kicked by MDC officers and placed into a wet cell, with a mattress on the floor. Khalifa's wrists were cut and bruised from his handcuffs, and he was worried about other detainees, whom he heard gasping and moaning through the walls of his cell.

202. Khalifa was interviewed by the FBI and the INS on October 7, 2001 at MDC. One of the FBI officers

noticed the bruises on Khalifa's wrists and apologized. When Mr. Khalifa told them he was being abused by MDC guards, they stated it was because he was Muslim. The agents questioned him about whether he knew Sheikh Omar Abdel-Rahman, and whether Khalifa was religious. They asked him how frequently he prayed and what mosques he visited in Egypt. This was his only interview with the FBI. In their notes of the interview, the FBI agents did not express any doubt as to Kahlifa's credibility, any suspicion of ties to terrorism, nor any interest in him in connection to the PENTBBOM investigation.

203. After the interview, Khalifa was strip-searched by MDC guards, who recorded the search with a video camera and laughed when they made him bend over and spread his buttocks.

204. The conditions of Khalifa's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Khalifa was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Khalifa was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Khalifa was not provided with timely notice of MDC's complaint procedures.

205. Whenever Khalifa was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along

the way, for example, by deliberately over-tightening his cuffs and twisting his fingers and wrists. They tried to conceal this abuse from the cameras. Despite the pain, Khalifa offered no resistance, fearing that resistance would only make matters worse. Guards on the night-shift smoked on the range and blew smoke into Khalifa's cell.

206. Toward the end of November, Khalifa was placed into a cell with Benamar Benatta. Benatta had a lot of trouble sleeping because of the cell lights and the guards making noises throughout the night. At one point, Benatta had not slept for four nights straight and tried to complain to the guards about it. Khalifa heard Benatta ask for them to turn off the lights, or for sleeping pills or even just something to read. No one responded. One night, Khalifa awoke in the middle of the night to find that Benatta had taken a plastic spoon and cut himself on his hand. The next morning, Benatta began slamming his head into the wall. Khalifa tried to stop him, but Benatta pushed him away, so Khalifa pushed the distress button in his cell to call the guards.

207. The guards burst into the cell and removed Khalifa, who was crying over worry about Benatta. They lifted Benatta up and slammed him into the wall as they removed him from the cell. Khalifa did not see Benatta again.

208. Benatta's breakdown coincided with the fourth day of Khalifa's hunger strike. He was refusing to eat until the MDC guards allowed him to call the Egyptian consulate. After Benatta was removed from his cell, one MDC guard told Khalifa that Benatta was refusing to eat until Khalifa began to eat too. To help Benatta, Khalifa

started eating again, despite his continued lack of consular access.

209. Khalifa made many requests of the guards: for shoes, books, and medical care, and for clothing to cover himself because female guards were present, and therefore saw him naked, during clothing exchange. None of these requests was granted.

210. Khalifa's conditions of confinement were completely without penological justification, as the FBI never developed any evidence to connect Khalifa to terrorism, and no one at the FBI or the BOP had any reason to suspect Khalifa of posing a danger. The only reason Khalifa was ever suspected of a connection to terrorism was his identity as a Muslim from Egypt.

211. By November 5, 2001, the New York office of the FBI had completed its clearance investigation of Khalifa, and sent his name to SIOC, at FBI headquarters, to be sent out for a CIA name trace. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Khalifa, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. Khalifa's clearance was "pending" at FBI headquarters as early as November 14, 2001, yet Khalifa was held in limbo for months longer. A list of "of interest" detainees maintained at FBI headquarters dated December 17, 2001 states that the FBI had no interest in Khalifa, and that a clearance letter by Maxwell had been signed, but not sent. Khalifa was not officially cleared until December 19, 2001. He was not deported nor released from the ADMAX SHU until mid-January.

212. Khalifa was deported on January 13, 2002. It was the middle of the winter, but the MDC guards brought him to JFK airport wearing only pants and a t-shirt. Khalifa asked for a coat, and they refused.

213. Khalifa was seriously affected by his detention and abuse. He sought treatment for depression upon return to Egypt, and continues to suffer to this day. Among other symptoms, he has trouble concentrating, and has found his medical study difficult. These issues have negatively affected his career in medicine and his ability to enjoy life.

Saeed Hammouda

214. Saeed Hammouda lawfully entered the United States on August 31, 1999 on a business visa. He subsequently changed his status to a student visa and began studying to receive an MBA in marketing. He married a United States citizen with whom he had a prior relationship in March 7, 2001, and she petitioned for him to change his status to a lawful permanent resident.

215. On October 7, 2001, Hammouda was temporarily staying at the Manhattan apartment of a friend, Nabil Abdullah, when five or six FBI and INS agents arrived at his door. Hammouda allowed the agents to search the apartment. The FBI treated his friend's things as if they were Hammouda's and seized several items that belonged to Hammouda's friend including a computer, flight manuals, and an ice making machine.

216. The agents told Hammouda they were interested in him because he was not in the United States lawfully. The agents asked him if he was religious, what mosques he attended, and whether he prayed every Friday. Hammouda gave them his social security card and identifica-

tion card. He was sick and preparing to take medicine, which they would not allow him to do. The INS agents asked him questions about his wife and his marriage. This lasted for several hours.

217. A week later, on October 14, 2001, FBI and INS agents returned to the apartment. One INS officer told Hammouda he was present in the country illegally and arrested him. Hammouda was transported to the INS Varick Street detention center and charged with violating his visa by working without authorization. When he was eventually brought before an immigration judge ("IJ"), an INS officer opposed his bond and the IJ denied bond. He was also brought for immigration hearings on November 14, 2001 and December 5, 2001. On February 15, 2002 he received a final removal order, which he did not appeal. The INS could have removed Hammouda within weeks, instead his deportation was delayed while he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

218. After processing at the Varick Street detention center, Hammouda was placed in a convoy of vehicles and transported to the MDC. He was processed on the ground floor of the MDC and his glasses were taken from him. During his transport and processing, Hammouda was verbally and physically abused and called derogatory names. He was pressed against the wall several times, and sometimes his face hit the wall. He was strip-searched three times, and called names such as "terrorist" and "Arabic asshole." He was then transported to the ADMAX SHU, where he was detained for eight months.

219. In January 2002, Hammouda was interrogated for four or five hours by two FBI agents and an INS officer. He was interrogated several times, and was administered a polygraph test. These interrogations and the polygraph test caused distress and anxiety.

220. The conditions of Hammouda's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Hammouda was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Hammouda was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Hammouda was not provided with timely notice of MDC's complaint procedures.

221. Whenever Hammouda was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately overtightening his cuffs and twisting his fingers and wrists. They tried to conceal this abuse from the cameras. Despite the pain, Hammouda offered no resistance, fearing that resistance would only make matters worse.

222. Officers routinely used profanity and called Hammouda derogatory names. One officer threw hygiene supplies at the detainees during the materials' distribution. Other officers made sexual comments about

Hammouda's wife. Hammouda complained to various MDC supervisors about this abuse.

223. In the winter months the SHU was very cold at night. Mr. Hammouda could not sleep because of the lights and the temperature. On some nights, Mr. Hammouda paced his small cell to become fatigued and induce sleep.

224. Hammouda's conditions of confinement were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Hammouda of connection to terrorism or posing a danger. The FBI never developed any evidence to connect Hammouda to terrorism, or to cause concern that he might be dangerous. The only reason Hammouda was ever suspected of a connection to terrorism was his identity as a Muslim from Egypt.

225. As early as October, Hammouda's INS file indicated that he was not of interest. And on November 5, 2001 the New York Field office indicated their investigation was complete by submitting Hammouda's name to SIOC so that FBI Headquarters could request a CIA name trace and officially clear him. Headquarters had apparently already received this clearance through another source, because on November 1, 2001, SIOC requested CIA name traces on over one hundred detainees, including Hammouda, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Headquarters indicated that the detainees would probably be released within seven days.

226. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next

month, reminding them that Hammouda, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. However, as of December 17, 2001, FBI Headquarters listed Hammouda as "of interest." Hammouda was officially cleared by FBI Headquarters on January 17, 2002, yet he was not removed from the ADMAX. Inexplicably, on May 3, 2002 SIOC sent an electronic communication to the New York field office again requesting information about whether the FBI had an interest in Hammouda. The New York field office responded on May 15, 2002 that now they did have an investigative interest in Hammouda.

227. Despite having been cleared of any connection to terrorism in January, Hammouda was detained in the ADMAX until he was deported on June 14, 2002.

228. Hammouda continues to suffer the emotional and psychological effects of his detention in the United States. He felt like a stranger to his own family when he was released from custody. For almost eight months after his release, he did not work and remained at home. Even today, he has problems in open areas and prefers to be in little or no light. He is fearful of any travel outside Egypt.

Purna Raj Bajracharya

229. Bajracharya entered the United States in 1996 on a three-month B1 business visa. He overstayed that visa to remain in Queens, New York for five years. He worked at various odd jobs, including at a Queens Pizzeria and a flower Shop in Manhattan, and sent money home to his wife and sons in his native Nepal.

230. Bajracharya planned to return to his home, Katmandu, in fall or winter 2001. In anticipation of that return, he used his video-camera to record the New York streets he had grown to know, so that he could show them to his wife and children. Bajracharya came to the attention of the FBI on October 25, 2001, when a Queens County District Attorney's Office employee observed an "arab male" videotaping outside a Queens' office building that contained the Queens County District Attorney Office and a New York FBI office. Investigators from the Queens D.A. office approached Bajracharya, and asked him why he was taking pictures. Bajracharya, who speaks little English, tried to explain that he was a tourist. He was taken inside the building, searched, and interrogated. At some during the five hour long interview, FBI and INS agents arrived and took part.

231. Upon the agents' request, Bajracharya brought the FBI and INS to his apartment in Woodside and provided them with his passport and various identification documents. He acknowledged that he had overstayed his visa and was in the United States unlawfully.

232. Bajracharya was then placed under arrest by the INS. FBI Agent Wynne, who was assigned to investigate Bajracharya further, indicated to the INS that he would follow up with a telephone call the next day regarding whether or not the FBI had interest in Bajracharya.

233. An INS form I-213 dated October 26, 2001 indicates that FBI interest in Bajracharya was "undetermined" and the case was assigned to FBI Agent Wynne. That day, however, the FBI special agent in charge of the New York Joint Terrorism Task Force told the INS that Bajracharya was "of active investigative interest to the

FBI" based on the videotaping. Thus, the INS district director recommended that Bajracharya be detained in MDC. A second I-213 was issued, indicating that the FBI had "special interest" in Bajracharya. The following day, October 27, the Custody Review Unit at INS headquarters in DC approved Bajracharya's transfer to MDC.

234. Bajracharya was transported to MDC on October 27, 2001. He recalls being pushed forcibly when he was brought out of the van and seeing a T-shirt on the wall with a picture of an American flag on it. He was taken to the ADMAX SHU and placed in a cell alone. He remained alone for the next two months.

235. Bajracharya was interviewed at MDC, this time with the assistance of an interpreter, by FBI Agent Wynne and other law enforcement personnel on October 30, 2001. Bajracharya provided the agents with information about his time in the United States, his employment history and his finances, and explained that he was videotaping the building in question as a tourist. Bajracharya was asked whether he was Muslim or knew any Muslims. A Buddhist, Bajracharya explained that he was not Muslim, knew no Muslims, and loved the United States but was planning to return to Nepal to be with his family. In his notes regarding the interview, Wynne did not did not express any doubt as to Bajracharya's credibility, any suspicion of ties to terrorism, nor any interest in him in connection to the PENTTBOM investigation.

236. Two days later, after corroborating various aspects of Bajracharya's statements, FBI Agent Wynne issued an FBI report clearing Bajracharya of any connection to terrorism and informed him that he could expect the matter to be resolved within a week or so. That

weekend, Wynne received pleading phone calls from Bajracharya's sons, who had learned of their father's arrest from his roommate in Queens.

237. By November 5, 2001, the New York office of the FBI had completed its clearance investigation of Bajracharya and sent his name to SIOC, at FBI headquarters, to be sent out for a CIA name trace. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Bajracharya, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. Other FBI documents, including a list of interest detainees maintained in FBI headquarters, indicate that the FBI had closed its investigation and concluded they had no interest in Bajracharya by mid-November 2001. Despite all these clearances, Bajracharya was held at MDC in the ADMAX SHU until he was deported on January 13, 2001.

238. Throughout Bajrachareya's confinement, Agent Wynne spoke to counterterrorism officials in the United States Attorney's Office and within the INS, seeking to understand why the detainee he had affirmatively cleared of any connection to terrorism was still in the ADMAX SHU at MDC. After becoming frustrated with his inability to achieve official clearance for Bajracharya, Wynne called The Legal Aid Society, and advised an attorney there, Olivia Cassin, that Bajracharya needed representation.

239. The conditions of Bajracharya's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Bajracharya was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel

and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Bajracharya was not provided with timely notice of MDC's complaint procedures.

240. Bajracharya is a small man—approximately 5'3", and, at the time of his arrest, about 130 pounds. Whenever Bajracharya was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination. Bajracharya offered no resistance, fearing that resistance would only make matters worse.

241. Bajracharya could not sleep due to the light in his cell. He was so traumatized by his experience at MDC that he began weeping constantly. He thought he was going crazy, and several times indicated to MDC personnel that he was feeling suicidal. He recalls screaming to guards that he was going to die. Indeed, Cassin asked an MDC doctor to transfer Bajracharya to general population, and the doctor responded that Bajracharya was crying too much, and would cause a riot. Guards on the ADMAX scolded Bajracharya for crying, and called him and the other detainees foul names.

242. Bajracharya's conditions of confinement were completely without penological justification, as the FBI never developed any evidence to connect Bajracharya to terrorism, and the FBI officer in charge of investigating Bajracharya affirmatively found that he posed no danger as early as November 1, 2001. No one at the FBI or the BOP had any reason to suspect Bajracharya of posing a danger. The only reason Bajracharya was ever suspect-

ed of a connection to terrorism was his "Arab" appearance.

243. Bajracharya was charged with a section 237(a)(1)(B) overstay. He attended an immigration hearing at MDC on November 1, 2001 and another on November 19, 2001, during which the immigration attorney assigned to his case sought and received a continuance, as FBI clearance to release Bajracharya had not yet been received from Washington DC. Bajracharya did not have counsel present at that hearing. Ms. Cassin was first able to meet with Bajracharya at MDC for his next immigration hearing on December 6, at which the government acknowledged that Bajracharya had been cleared by the FBI and agreed to voluntary departure. Based on the immigration judge's instructions, Cassin bought Bajracharya an airplane ticket to Katmandu through a deportation officer, but that departure date was cancelled without explanation.

244. Bajracharya was deported to Nepal on January 13, 2002. Cassin and Wynne brought a suit to MDC and provided it to an assistant warden there so that Bajracharya would, at least, have clothing to fly home in. Instead, he was taken to a plane in an orange jumpsuit and shackles. Bajracharya's treatment at the ADMAX SHU profoundly affected him, and continues to affect him. Since his release, he has felt introverted, is quicker to anger, and is less inclined to leave his home and visit with friends. He has trouble sleeping, and feels as though he has lost himself.

Ibrahim Turkmen

245. Ibrahim Turkmen entered the United States through New York City on a tourist visa in early Octo-

ber 2000 to visit an old friend from Turkey who lived on Long Island.

246. In late October 2000, Turkmen, at his friend's suggestion, found work at a service station in Bellport, Long Island. He worked there several days a week until mid-January 2001, when he took a job at another service station in the same town. In mid-April 2001, he began working part-time for a locally-based Turkish construction company.

247. From his arrival in the United States until he was taken into INS custody, Turkmen frequently called his wife and four daughters back in Turkey. While dearly missing them, he decided to remain in the United States to provide for their support. Each week, Turkmen sent most of his meager earnings home to his family.

248. Turkmen spoke almost no English when he came to the United States. While here, he learned barely enough English words to conduct his limited daily business. At the time that he was taken into custody, Turkmen understood very little spoken English, and he could not read English at all.

249. At about 2:30 p.m. on October 13, 2001, slightly more than a month after the September 11 terrorist attacks, two FBI agents visited Turkmen at the apartment where he was staying with several Turkish friends in West Babylon, New York. Without advising him of his right to counsel, they asked Turkmen whether he had any involvement in the September 11 terrorist attacks and whether he had any association with terrorists. They also inquired as to his immigration status, among other things.

250. Turkmen had great difficulty understanding the FBI agents' questions given his limited knowledge of English and the lack of an interpreter. All the same, he did his best to answer truthfully. He denied any involvement with terrorists, terrorist organizations, or terrorist activity. The FBI agents, nonetheless, accused Turkmen of being an associate of Osama bin Laden, placed him under arrest, confiscated his personal items (passport, identification, credit cards, etc.) and money, and searched his home without his consent. Turkmen was fully interviewed on October 13, 2001 and no information was uncovered to connect him to the terrorism investigation.

251. Turkmen came to the attention of the FBI when his landlord called the FBI hotline to report that she rented an apartment in her home to several Middle Eastern men, and she "would feel awful if her tenants were involved in terrorism and she didn't call." The FBI knew that her only basis for suspecting these men was that they were Middle Eastern; indeed, she reported that they were good tenants, and paid their rent on time.

252. Turkmen was taken to an INS facility in Nassau County, fingerprinted, and further interrogated, this time by an INS official. Once again, he was not advised of his right to counsel. Due to his limited knowledge of English and the lack of an interpreter, Turkmen again had great difficulty understanding the questions. Still, he did his best to answer them truthfully. Turkmen again denied any involvement with terrorists, terrorist organizations, or terrorist activity, and requested a hearing before an immigration judge to determine whether he could remain in the United States. He was held at the Nassau County INS facility for five or six hours.

253. That evening, at approximately 11:30 p.m., Turkmen was brought to another INS facility in Manhattan, where INS officials asked him still more questions in English. Despite great difficulty understanding the questions, and without the aid of an interpreter, Turkmen again did his best to answer them truthfully. For the third time, he denied any involvement with terrorists, terrorist organizations, or terrorist activity.

254. Turkmen's interrogators then instructed him to sign various immigration papers which he could not read because they were in English. Afraid that he would only make matters worse for himself if he refused to comply, Turkmen reluctantly signed the papers.

255. Early the next morning, October 14, 2001, Turkmen was taken to the Passaic County Jail in Paterson, New Jersey, where he remained confined, except for a single trip to Immigration Court in Newark, New Jersey, until February 25, 2002, a period of nearly four and one-half months.

256. Shortly after arriving at the Passaic County Jail, Turkmen received a Notice to Appear from the INS, charging him with overstaying his visa and scheduling a hearing at Immigration Court in Newark, New Jersey on October 31, 2001. On the same date, he received a Notice of Custody Determination and requested a re- determination of the custody decision by an immigration judge.

257. On October 29, 2001, two FBI agents visited Turkmen at the Passaic County Jail. They asked him still more questions about his immigration status, his reasons for entering the United States, his work experience, his religious beliefs, and other personal matters. Another Turkish 9/11 detainee fluent in English trans-

lated the questions for Turkmen, who answered them all truthfully. For the fourth time, he denied any involvement with terrorists, terrorist organizations, or terrorist activities.

258. Two days later, on October 31, 2001, Turkmen was taken to Immigration Court in Newark, New Jersey, where he appeared *pro se* before an Immigration Judge. Once again, he was not advised of his right to counsel. While an interpreter was present, the interpreter was not of Turkish descent and was fluent in neither Turkish nor English. After conceding that he had overstayed his tourist visa, Turkmen accepted a voluntary departure order requiring him to leave the United States by November 30, 2001. He declined to request bond because the judge assured him that he would be allowed to return to Turkey within a matter of days. The INS never appealed the voluntary departure order issued to Turkmen.

259. When he returned to the Passaic County Jail later that day, Turkmen called a friend to ask him to purchase a plane ticket for Turkmen's return to Turkey. Two days later, on November 2, 2001, Turkmen's friend brought the ticket to the INS offices in Newark, New Jersey. Turkmen remained, nonetheless, in the Passaic County Jail for nearly four more months, until February 25, 2002. The INS prevented his compliance with the Immigration Judge's voluntary departure order and thereby caused an automatic entry of an order of removal with a future bar on reentry for 10 years.

260. While confined in the Passaic County Jail, Turkmen was not allowed to call his wife and four daughters back home in Turkey. He learned through a friend, however, that his wife had been hospitalized for a month with an undisclosed ailment so serious that she lost most of her

hair and teeth. Upon learning this, Turkmen was beside himself with worry. Unable even to call his seriously ailing wife, he suffered extreme emotional distress.

261. While confined in the Passaic County Jail, Turkmen was deliberately denied the ability to observe the mandatory practices of his religion, for example, by regularly interrupting his daily prayers and refusing to serve him Halal food.

262. On November 1, 2001, Mueller sent an electronic communication requesting CIA name traces on dozens of detainees, including Turkmen, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Mueller indicated that the detainees would probably be released within seven days. Turkmen was detained for months longer. A November 16, 2001 memo from the regional director of the INS indicated that the FBI's interest in Turkmen was "unknown."

263. On January 14, 2002, more than three months after he was taken into custody and more than two and one-half months after he received a voluntary departure order, the Assistant Special Agent in Charge of the New York FBI indicated to the INS that Turkmen had been cleared on any connection to terrorism. A few days later, on January 17, 2002, Turkmen was visited by an INS agent. The agent informed Turkmen that he had been "cleared" by the FBI but still needed to be "cleared" by the INS. When Turkmen asked how long the latter "clearance" might take, the agent replied that he did not know. On January 31, the INS acknowledged that Turkmen was not of interest to the FBI and thus removed him from the INS custody list, thereby clearing him to be deported.

264. On February 17, 2002, Turkmen was visited by another INS agent, who told Turkmen that he had received INS "clearance" and would be allowed to depart the United States within the next two weeks. Eight days later, on February 25, 2002, INS agents took Turkmen in handcuffs from the Passaic County Jail to Newark Airport, where they put him on a plane to Istanbul, Turkey, without a single penny or lira in his pocket. Although Turkmen requested the return of $52 confiscated from him at the time of his arrest—money that he needed to pay for, among other things, the eight-hour bus trip from Istanbul Airport to his home in the City of Konya—that request was denied.

265. As soon as Turkmen debarked from the plane at Istanbul Airport, he was met by a Turkish police officer, who escorted him to a nearby police station, where he was interrogated for about an hour concerning his four-and-one-half month detention in the United States. Once again, Turkmen denied any involvement with terrorists, terrorist organizations, or terrorist activity. After the interrogation concluded, he was allowed to leave for Konya, though he still had no money to buy the bus ticket. Only the kindness of a complete stranger who lent the necessary funds permitted Turkmen to return home.

266. Turkmen was again interrogated at length concerning his detention in the United States, this time by Konya's Security Intelligence Division, following the filing of this lawsuit on April 17, 2002. At the close of the interrogation, the Division's Superintendent told him to "be careful." Approximately 10 days later, Turkmen's father was contacted by the Head of Gendarmerie in Konya's Karapinar District, Turkmen's birthplace, to ascertain Turkmen's current address, ostensibly to "give to

the human rights organizations that are trying to reach Turkmen." Several days later, the Head of Gendarmerie in Konya's Cumra District asked Turkmen's former employer for Turkmen's personnel file. After reviewing the file, that gendarme took with him all the documents relating to Turkmen's 16 years of public service.

267. The presumption of guilt thus follows Turkmen even after his deportation from the United States, despite the fact that he has never been involved in terrorist activity and the complete absence of any evidence of his involvement in such activity. Because of this presumption, Turkmen is deemed a "security risk" and is thus unable to return to his prior government position.

268. Turkmen continues to suffer the emotional and psychological effects of his four and one-half months detention in the United States. He regularly experiences nightmares about his detention, making it difficult for him to sleep.

Akhil Sachdeva

269. Plaintiff Akhil Sachdeva is a native of India and a landed resident in Canada. In late September or early October 2001, Sachdeva returned to the United States from Canada to finalize his divorce from his wife and collect his personal belongings for his move back to Canada. Sometime in late November 2001, an FBI agent visited the gas station owned by Sachdeva's ex-wife in Port Washington, New York, looking for a Muslim employee. Not finding that individual, the agent left a message for Sachdeva's ex-wife to contact the agent. She, in turn, asked Sachdeva to do so.

270. Sachdeva came to the attention of the FBI when a New York City fireman called the FBI hotline and re-

ported that he had overheard two gas station employees "of Arab descent" having a conversation in Arabic and English, and the English included some discussion of flight simulators and flying.

271. In early December 2001, Sachdeva called the FBI agent, who asked Sachdeva to come to the agent's offices for an interview. Sachdeva agreed to do so. On December 9, 2001, Sachdeva met with two FBI agents at 26 Federal Plaza in Manhattan. They proceeded to question him at length about the September 11 terrorist attacks and his religious beliefs, among other things, though without advising him of his right to counsel or his right to remain silent. At the close of the interrogation, the agents examined Sachdeva's personal identification before allowing him to leave.

272. Sachdeva continued to close out his affairs in the United States in anticipation of his move back to Canada. In the early morning of December 20, 2001, while at his uncle's apartment, Sachdeva was arrested by INS agents. He was taken to the INS offices at 26 Federal Plaza, where he was interrogated for five hours about his ties to the September 11 terrorist attacks. At the close of the interrogation, INS agents confiscated all of Sachdeva's personal identification. He was then taken to Passaic County Jail. A memorandum from the interview of Sachdeva on December 20, 2001, the day of his arrest, indicates that the FBI had no further interest in Sachdeva related to the PENTTBOM investigation. Because no one asserted an investigative interest in Sachdeva, the New York INS office indicated to INS headquarters that FBI interest in Sachdeva was "undetermined." The FBI did not officially clear Sachdeva until January 30, 2002, over a month later.

273. On December 27, 2001, while confined in Passaic County Jail, Sachdeva received a Notice to Appear, charging him with illegal re-entry. (He had overstayed a prior voluntary departure order.) Sachdeva had a hearing on December 31, 2001, in Immigration Court in Newark, New Jersey. He was not given any extra clothing for the trip, despite the extreme cold. The immigration judge told Sachdeva that he would be deported to Canada or India "within 30 days." The INS did not appeal that final deportation order. A February 14, 2002 INS document lists Sachdeva as "ready to remove." Even though the INS could have effectuated Sachdeva's removal from the United States within a matter of days, Sachdeva was detained for another three and one-half months, until April 17, 2002.

274. On April 17, 2002, INS agents took Sachdeva, in old clothes, from Passaic County Jail to Newark Airport, putting him on a plane to Canada, though without his personal identification or any money. Prior to his deportation, Sachdeva requested the return of these items. His requests were denied.

275. Sachdeva continues to suffer the effects of his detention in the United States long after his deportation. Upon his return to Canada, Canadian immigration officials suspended his landed immigrant status, taking away Sachdeva's work papers. The presumption of guilt thus continued to attach to Sachdeva after his deportation from the United States, despite the fact that he has never been engaged in terrorist activity and the complete absence of any evidence that he has been engaged in such activity..

FIRST CLAIM FOR RELIEF
Fifth Amendment: Due Process—
Conditions of Confinement

276. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

277. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

278. By adopting, promulgating, and implementing the policy and practice under which MDC Plaintiffs and class members were unreasonably detained and subjected to outrageous, excessive, cruel, inhumane, punitive and degrading conditions of confinement, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly deprived MDC Plaintiffs and class members of their liberty interests without due process of law in violation of the Fifth Amendment to the United States Constitution.

279. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered physical and psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

SECOND CLAIM FOR RELIEF
Fifth Amendment: Equal Protection—
Conditions of Confinement

280. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

281. Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

282. In subjecting Plaintiffs and class members to harsh treatment not accorded similarly-situated non-citizens, Defendants, acting under color of law and their authority as federal officers, singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin, and intentionally violated their rights to equal protection of the law under the Fifth Amendment to the United States Constitution.

283. As a result of Defendants' unlawful conduct, Plaintiffs and class members have suffered physical and psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

THIRD CLAIM FOR RELIEF
First Amendment: Free Exercise of Religion

284. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

285. Plaintiffs Ibrahim Turkmen, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, and Saeed Hammouda bring this claim on their own behalf and on behalf of the class against all Defendants.

286. Defendants adopted, promulgated, and implemented policies and practices intended to deny Plaintiffs and class members the ability to practice and observe their religion. These policies and practices have included, among other things, the visitation of verbal and physical abuse upon Plaintiffs and class members, and the deliberate denial of all means by which they could maintain their religious practices, including access to Halal food and daily prayer requirements. By such mistreatment, Defendants, acting under color of law and their authority as federal officers, have intentionally or recklessly vio-

lated Plaintiffs' and class members' right to free exercise of religion guaranteed to them under the First Amendment to the United States Constitution.

287. As a result of Defendants' unlawful conduct, Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

FOURTH CLAIM FOR RELIEF
First Amendment: Communications Blackout and Interference with Counsel

288. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

289. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

290. By adopting, promulgating, and implementing the policy and practice under which MDC Plaintiffs and class members were subjected to a "communications blackout" and other measures while in detention that interfered with their access to family, lawyers and the courts, Defendants intentionally or recklessly violated MDC Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the First Amendment of the United States Constitution.

291. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

FIFTH CLAIM FOR RELIEF
Fifth Amendment: Due Process—Blackout and Interference with Counsel

292. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

293. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

294. By adopting, promulgating, and implementing the policy and practice under which Plaintiffs and class members were subjected to a "communications blackout" and other measures while in INS detention that interfered with their access to family, lawyers and the courts, Defendants intentionally or recklessly violated MDC Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

295. MDC Plaintiffs and class members have no effective means of enforcing their Fifth Amendment rights other than by seeking declaratory and other relief from the Court.

296. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

SIXTH CLAIM FOR RELIEF
Fourth and Fifth Amendments; Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip-searches

297. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

298. The MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all MDC Defendants.

299. By subjecting MDC Plaintiffs and class members to excessive and unreasonable strip-searches with no rational relation to a legitimate penological purpose when Defendants had no reasonable suspicion or rational reason to justify a strip-search, and conducting the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose, MDC Defendants intentionally or recklessly violated MDC Plaintiffs' and class members' rights to privacy and to be free from unreasonable searches, in violation of their rights under the Fourth Amendment to the United States Constitution

300. MDC Defendants were grossly negligent and/or deliberately indifferent in their supervision of MDC staff who subjected MDC Plaintiffs and class members to these excessive and punitive strip-searches and thereby violated MDC Plaintiffs' and the plaintiff class's rights under the Fourth Amendment to the United States Constitution.

301. By creating and approving the policy and practice under which MDC Plaintiffs and class members were subjected to these punitive strip-searches MDC Defendants intentionally or recklessly violated MDC Plaintiffs' and class members' right to be free from punishment

under the Due Process Clause of the Fifth Amendment to the United States Constitution

302. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

SEVENTH CLAIM FOR RELIEF
(42 U.S.C. § 1985: Conspiracy to Violate Civil Rights)

303. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

304. Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

305. Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Sherman, Lopresti and Cuciti, by agreeing to implement a policy and practice whereby Plaintiffs were harassed, physically and verbally abused, subjected to harsh and punitive conditions of confinement, subjected to routine and unreasonable strip-searches, burdened in their exercise of their religious beliefs, denied adequate recreation, nutrition, access to counsel and communication with the outside world because of their race, religion, ethnicity and national origin, conspired to deprive Plaintiffs of the equal protection of the law and of equal privileges and immunities of the laws of the United States, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3).

306. As a result of Defendants' unlawful conduct Plaintiffs suffered physical injury and emotional distress and are accordingly entitled to compensatory damages against all Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and class members respectfully request that the Court enter a class-wide judgment:

1. Certifying this suit as a class action;

2. Awarding compensatory and punitive damages to Plaintiffs and class members for the constitutional violations they suffered in an amount that is fair, just, reasonable, and in conformity with the evidence;

3. Awarding Plaintiffs attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

4. Ordering such further relief as the Court considers just and proper.

Dated: New York, New York
Sept. 13, 2010

Respectfully submitted,

/s/ RACHEL MEEROPOL

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RECORD AND BRIEFS

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No. 15-1359

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS

v.

IBRAHIM TURKMEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 15-1359

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS

v.

IBRAHIM TURKMEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held that the former Attorney General of the United States and the former Director of the Federal Bureau of Investigation (FBI) may be subjected to discovery, other demands of further litigation, and potential liability for compensatory and punitive damages in their individual capacities for unintended consequences arising from the implementation of policy decisions they made 15 years ago during an unprecedented national-security crisis. As six members of the court below recognized, that decision "raises questions of exceptional importance meriting further review," departs from this Court's decisions in three separate areas of the law, and puts the Second Circuit "at odds" with several other circuits. Pet. App. 241a, 242a-243a, 249a (joint dissent from denial of rehearing). Several other former Attorneys General and FBI Directors agree. See Amicus Brief of William Barr et al.

In addition to defending the decision below on the merits, respondents[1] contend that the Court "should not decide this case at an early stage of proceedings without a nine-Justice Court." Br. in Opp. 34 (capitalization modified). Waiting for this case to proceed to summary judgment or trial, however, would not alter the recusal possibility that respondents identify. *Id.* at 36 n.15. And all three questions presented in the petition are threshold issues most appropriately resolved at the motion-to-dismiss stage. Indeed, the Court has "repeatedly" emphasized "the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam)); see *Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'") (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). And it is especially important to do so when the officials involved are the former Attorney General and FBI Director. As it did in *Iqbal*, the Court should grant a writ of certiorari.

A. Factors That Other Circuits Would Have Considered To Be Part Of The "Context" Of This Case Counsel Against Extending The *Bivens* Remedy To Respondents' Allegations

The petition explains (at 13-19) how the court of appeals flouted this Court's repeated admonitions to

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[1] We use the term "respondents" to refer to the six plaintiffs who have challenged the conditions of their confinement at the Metropolitan Detention Center (MDC). See Pet. 2 n.1.

exercise caution before extending the judicially inferred remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), into "any new context," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). Consistent with the court of appeals' blinkered approach, respondents contend that their *Bivens* claims "arise in a familiar context" because they raise "a familiar constitutional claim based on a familiar mechanism of injury." Br. in Opp. 14, 16 (capitalization modified).

That vague, two-part calculus is neither articulated in nor consistent with this Court's decisions. See Pet. 15-16. That approach allowed the court below to disregard three salient considerations about the official actions that respondents challenge: that they were (1) high-level policy decisions that implicated both (2) national security and (3) immigration. Other courts of appeals would have treated such considerations as relevant to the determination whether respondents sought to extend the *Bivens* remedy to a new and problematic "context." Pet. 17-19 (citing cases from the Fourth, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits).

Respondents suggest (Br. in Opp. 18, 22) that this case does not actually implicate either "immigration" (because they object to "their mistreatment in custody," which they view as having "nothing to do with their immigration proceedings") or national security (because the government did not know whether they actually posed a national-security threat). Those suggestions lack merit. The policy decisions that respondents challenge were not directed toward all persons (or all immigrants) in federal custody. Instead, they applied—as reflected in the subtitle of the In-

spector General Report—to "*Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks.*"[2] The class of persons whose conditions of confinement respondents seek to challenge consisted entirely of aliens who were arrested during the government's investigation into the September 11 attacks and detained for apparent violations of U.S. immigration laws. The hold-until-cleared policy and the decision to merge two lists of such immigration detainees therefore necessarily implicated both national-security and immigration concerns.

"Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Mirmehdi* v. *United States*, 689 F.3d 975, 982 (9th Cir. 2012) (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)), cert. denied, 133 S. Ct. 2336 (2013). The existence of that comprehensive statutory regime discountenances the extension of a judicially created damages remedy that Congress has not chosen to incorporate into the immigration laws. Similarly, to the extent that the constitutional violations alleged in this case inhered in policies promulgated (or condoned) by the Attorney General, they were more likely to be amenable to judicial review under the Administrative Procedure Act, and more likely to receive scrutiny from Congress and the Inspector General (as they in fact did), than are the actions of rogue line-level officers that the *Bivens* remedy has historically been used

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[2] Office of the Inspector Gen., Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003), https://oig.justice.gov/special/0306/full.pdf (*OIG Report*).

to redress. See Pet. 18. An additional judicially created remedy permitting damages against the Attorney General personally is thus unnecessary and inappropriate.

In addition to misperceiving the significance of each of the three contextual considerations described above, respondents fail to appreciate that the three factors *taken together* make up the relevant *Bivens* "context." Respondents contend that no court of appeals has treated any one of those factors as sufficient to preclude a *Bivens* remedy, Br. in Opp. 18-24, but their divide-and-conquer approach misses the point. Other courts of appeals have repeatedly recognized that each of the three considerations alters the relevant context of the claim and may counsel against an extension of *Bivens*. See Pet. 18-19. Although no other case appears to have involved this precise confluence of factors, the decision below remains "at odds" with those of other courts of appeals. Pet. App. 243a (joint dissent from denial of rehearing). As the outlier, it warrants this Court's review.

B. Even Under The Lists-Merger Theory, There Was No Clearly Established Constitutional Or Statutory Prohibition Against Continuing Respondents' Restrictive Conditions Of Confinement Until Respondents Were Cleared Of Any Connections With Terrorism

Even assuming that respondents have adequately alleged that petitioners Ashcroft and Mueller personally condoned or endorsed a decision to merge the New York and national INS Lists of September 11 detainees, petitioners would still be entitled to qualified immunity because it was not clearly established in 2001 that respondents' continued confinement at the MDC under the hold-until-cleared policy would be

unconstitutional. See Pet. 21-24. By equating respondents with "ordinary civil detainees" or "pretrial detainee[s]" being held in "the most restrictive conditions of confinement available," Pet. App. 43a, 49a, the court of appeals made the all-too-common mistake of conducting qualified-immunity analysis at a level of generality that did not adequately account for "the situation [the defendants] confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); see Pet. 21-22.

Respondents were not ordinary civil detainees. They had already been arrested pursuant to the September 11 investigation, placed in the MDC, and subjected to the hold-until-cleared policy before it was discovered that, for some members of the New York List, arresting officers had failed to conduct the same initial vetting that detainees on the national INS List had received. The court of appeals, moreover, recognized that respondents' violations of U.S. immigration law justified their confinement (albeit in less restrictive conditions). Pet. App. 47a, 75a. Like the court of appeals, respondents cite no decisions indicating, much less clearly establishing as of late 2001, that continuing to apply the hold-until-cleared policy to such individuals was so "arbitrary or purposeless to national security" as to be unconstitutional. *Id.* at 141a (Raggi, J., dissenting in relevant part). Instead, respondents simply assume that some unspecified quantum of "individualized suspicion" (Br. in Opp. 2, 33 (emphasis omitted)) is a necessary predicate for any unusually restrictive confinement of lawfully detained persons, despite the dissenters' citation of contrary decisions, Pet. App. 247a & n.12 (joint dissenters); *id.* at 139a-140a (Judge Raggi); see Pet. 23 n.10.

Respondents assert (Br. in Opp. 25 n.8) that the qualified-immunity arguments set forth in the petition "ignor[e] the actual allegations in" their Fourth Amended Complaint. Throughout their brief in opposition, however, respondents seek to obscure the applicable qualified-immunity analysis by ignoring the limits of the lists-merger theory of liability countenanced by the court of appeals. Citing *Korematsu* v. *United States*, 323 U.S. 214 (1944), respondents persist in characterizing themselves as the subjects of a nationwide roundup based on nothing but their religion and apparent race or national origin. See Br. in Opp. 4-6, 9, 25, 29, 30, 33. The court of appeals, however, squarely *rejected* respondents' theory that the hold-until-cleared policy was unconstitutional *ab initio*. See Pet. App. 31a (describing "the mandate's facial validity" and petitioners' "right to presume that subordinates would carry it out in a constitutional manner"); *id.* at 47a, 63a. In fact, *no* judge on either of the courts below endorsed respondents' theory of liability.

The court of appeals' more limited theory of liability —premised on the merger of the two lists—likewise falters at the second step of qualified-immunity analysis. The Inspector General's conclusion that the decision to merge the lists was "supportable" (*OIG Report* 71), and the Second Circuit's 6-6 division in response to the petitions for en banc review, refute the panel majority's conclusion that petitioners' actions violated clearly established constitutional norms. See *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011) (citing eight-judge dissent from

denial of rehearing in finding that former Attorney General Ashcroft "deserve[d] qualified immunity" for an alleged policy about detention of terrorism suspects). With respect to the alleged violation of 42 U.S.C. 1985(3), respondents do not even attempt to defend the court of appeals' qualified-immunity analysis, which erroneously conflated constitutional and statutory equal-protection rights after acknowledging that Section 1985(3)'s applicability to federal officials was *not* clearly established in 2001. See Pet. 25-26; see also *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984).

Thus, even if the special factors described in Part A, *supra*, did not counsel against extension of the *Bivens* remedy to respondents' allegations against the former Attorney General and former FBI Director, those officials would at least be entitled to qualified immunity for the constitutional and statutory claims in this case. This Court should grant review and confirm, more than 14 years after this case began, that those officials cannot be compelled to defend against the claims for money damages set forth in respondents' complaint. See Pet. 26 n.12 (citing nine cases since 2011 in which the Court has reversed court of appeals decisions and ordered that suits against individual governmental officials be dismissed on qualified-immunity grounds).

C. Respondents Have Not Plausibly Alleged That The Decision To Merge Lists Was Made Because Of, Rather Than In Spite Of, Allegedly Discriminatory Conduct Underlying Some Arrests

With respect to the third question presented, the petition explains (at 27-31) that the decision below did not faithfully apply the pleading standard required by this Court's decision in *Iqbal*. Respondents' allega-

tions depend on speculation at many critical steps and do not plausibly attribute to Attorney General Ashcroft or Director Mueller a discriminatory purpose for merging (or condoning the merger of) detainee lists. Even if those officials engaged in the conduct that respondents allege, their actions are susceptible of an "obvious" and nondiscriminatory "alternative explanation" (*Iqbal*, 556 U.S. at 682 (citation omitted)), namely "concern that absent further investigation, 'the FBI could unwittingly permit a dangerous individual to leave the United States,'" Pet. App. 19a (quoting *OIG Report* 53).

Respondents contend (Br. in Opp. 28-29) that, at the present motion-to-dismiss stage of this case, the courts below were required to accept respondents' "specific[] alleg[ations] that Respondents were not, and Petitioners *knew* that they were not, 'dangerous individual[s].'" But such "conclusory" allegations of a culpable mental state are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. That is particularly so given the implausibility of the allegations on which respondents rely. Without further investigation, Ashcroft and Mueller could not have *known* that respondents, or any other individuals on the New York List, were not actually dangerous. The premise of the hold-until-cleared policy, and of the reasonable desire to avoid "unwittingly" releasing a dangerous person, Pet. App. 19a, was that the government did not know that a detainee could be safely released until investigation had cleared him of "potential connections to those who committed terrorist acts," *Iqbal*, 556 U.S. at 682. Although respondents allege that this uncertainty did not provide a constitutionally sufficient justification for the hold-

until-cleared policy, they cannot reasonably dispute that the uncertainty existed.

Respondents' inference that any participation by Ashcroft and Mueller in the lists-merger decision was motivated by discrimination is especially implausible because that decision merely preserved the pre-merger status quo (which, the court of appeals concluded, did not plausibly reflect unconstitutional intent on the part of Ashcroft or Mueller, Pet. App. 31a, 47a, 63a). The merger decision did not cause anyone to be transferred to "an especially restrictive form of confinement" (Br. in Opp. 28) at the MDC. To the contrary, it allowed the majority of detainees from the New York List to remain in far-less-restrictive conditions at the Passaic County Jail. See Pet. App. 130a, 152a-153a (Raggi, J., dissenting).[3]

As in *Iqbal*, the allegation that others "may have labeled [a detainee] a person 'of high interest' [to the September 11 investigation] for impermissible reasons" is not sufficient to show that Ashcroft or Mueller "purposefully housed detainees in" restrictive conditions at the MDC "due to their race, religion, or national origin." 556 U.S. at 682-683. Accordingly, respondents have still failed to identify anything indicating that "the decision to merge the lists was made *because of*, rather than in spite of, the allegedly discriminatory conduct underlying some of the original arrests." Pet. 30; cf. *Iqbal*, 556 U.S. at 676-677 (explaining that purposeful discrimination requires more than "intent as awareness of consequences," and "instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, the action's

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[3] Respondents do not challenge the court of appeals' dismissal of the claims brought by the Passaic plaintiffs. Br. in Opp. 36 n.15.

adverse effects upon an identifiable group") (citation, brackets, and internal quotation marks omitted). The conflict between this Court's decision in *Iqbal* and the decision below—decisions entered in what is for all practical purposes the same lawsuit—warrants this Court's review.

* * * * *

Allowing this 14-year-old damages suit to proceed comes at a substantial cost, one that courts should be especially reluctant to impose in the context of the unprecedented investigation into the September 11 attacks. In such situations, policy-making national officeholders should not be "deterred from full use of their legal authority" (*al-Kidd*, 563 U.S. at 747 (Kennedy, J., concurring)) by the prospect of prolonged litigation and potential personal monetary liability.

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

AUGUST 2016

RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-1359

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

AHMER IQBAL ABBASI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General and Director of the Federal Bureau of Investigation (FBI) personally liable for policy decisions made about national security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether the former Attorney General and FBI Director are entitled to qualified immunity for their alleged role in the treatment of respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether respondents' allegations that the former Attorney General and FBI Director personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanation—identified by the Court in *Iqbal*—that their actions were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to be released.

PARTIES TO THE PROCEEDING

Petitioners John D. Ashcroft (former Attorney General of the United States) and Robert Mueller (former Director of the Federal Bureau of Investigation) were defendants in the district court and cross-appellees in the court of appeals.

The other parties to the proceeding include:

Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya, on behalf of a putative class, who were plaintiffs in the district court and appellees-cross-appellants in the court of appeals;

Ibrahim Turkmen and Akhil Sachdeva, who were also plaintiffs in the district court and appellees-cross-appellants in the court of appeals but have not entered an appearance in this Court;

Dennis Hasty (former Warden of the Metropolitan Detention Center), Michael Zenk (former Warden of the Metropolitan Detention Center), and James Sherman (former Metropolitan Detention Center Associate Warden for Custody), who were defendants in the district court and appellants-cross-appellees in the court of appeals; Hasty and Sherman are the petitioners in No. 15-1363; and

James W. Ziglar (former Commissioner of the Immigration and Naturalization Service), who was a defendant in the district court and a cross-appellee in the court of appeals, and is the petitioner in No. 15-1358.*

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* Two other individuals (Salvatore Lopresti and Joseph Cuciti) were defendants in the district court but were not parties in the court of appeals. See Pet. App. 3a n.2.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-163a) is reported at 789 F.3d 218. The opinions of members of the court of appeals concurring in and dissenting from the denial of rehearing en banc (Pet. App. 237a-250a) are reported at 808 F.3d 197. The opinion of the district court (Pet. App. 164a-236a) is reported at 915 F. Supp. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2015. Petitions for rehearing were denied on December 11, 2015 (Pet. App. 237a-238a). On February 29, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 11, 2016. On April 1, 2016, Justice Ginsburg further extended the time to May 9, 2016,

and the petition was filed on that date. The petition for a writ of certiorari was granted on October 11, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Like *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this case involves civil claims against high-ranking federal officials brought by aliens who were arrested after the September 11, 2001 terrorist attacks and detained at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Petitioners are the former Attorney General of the United States and the former Director of the Federal Bureau of Investigation (FBI). As relevant here, six respondents claim, on behalf of themselves and a putative class, that the highly restrictive conditions of their detention at the MDC violated their substantive-due-process and equal-protection rights under the Fifth Amendment. Pet. App. 301a-332a, 342a-343a (Fourth Am. Compl. (Compl.) ¶¶ 141-244, 276-283).[1] Respondents contend that petitioners, along with other Department of Justice officials, are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and liable as co-conspirators under 42 U.S.C. 1985(3). See Pet. App. 255a-256a (Compl. ¶ 9). Re-

[1] The court of appeals affirmed the dismissal of claims brought by Ibrahim Turkmen and Akhil Sachdeva (who were detained elsewhere), Pet. App. 75a, 84a, 86a, and those two individuals did not appear in this Court at the certiorari stage, see Br. in Opp. 36 n.15. This brief therefore uses "respondents" to refer to the six plaintiffs who were detained at the MDC, to the exclusion of the others identified in the Parties to the Proceeding section (see p. II, *supra*). The caption of the case has been altered to identify one of the MDC detainees, rather than Turkmen, as the lead respondent.

spondents seek compensatory and punitive damages, as well as attorney's fees and costs, from those officials in their individual capacities. *Id.* at 348a (prayer for relief).

As the Court discussed in *Iqbal*, the Department of Justice conducted a massive investigation to identify the perpetrators of the September 11 attacks and to prevent any follow-on attacks. 556 U.S. at 667. "The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor" and, in the first week, "'received more than 96,000 tips or potential leads from the public.'" *Ibid.* (quoting Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 12 (Apr. 2003) (*OIG Report*)).[2]

Because the perpetrators of the September 11 attacks were all foreign nationals, the Department's investigation "had a significant immigration law component." *OIG Report* 12 (J.A. 60). FBI agents were instructed that "if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the * * * attacks." *Id.* at 13 (J.A. 61). Immigration and Naturalization Service (INS) agents, who worked in tandem with the FBI, were instructed to "exercise sound judgment" and to limit arrests to those aliens in whom the FBI had "an interest." *Id.* at 44 (J.A. 108). In the first two months of the investigation, "the FBI ques-

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[2] The *OIG Report*, with the original pagination cited in *Iqbal* and the decisions below, is available at https://oig.justice.gov/special/0306/full.pdf. Most of the report is also reprinted at J.A. 34-335.

tioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general." *Iqbal*, 556 U.S. at 667. Federal officials eventually arrested and detained 762 aliens on immigration charges. *Ibid.*

Aliens arrested for immigration violations who were not deemed of interest to the September 11 investigation were processed according to normal INS procedures. *OIG Report* 40 (J.A. 102). By contrast, aliens deemed of interest to the investigation were subjected to an unwritten "hold until cleared" policy, under which they were held without bail until they had been cleared of any connections to terrorism. *Id.* at 37-40 (J.A. 97-101).

The hold-until-cleared policy did not specify where September 11 detainees should be detained during their clearance investigations. The responsibility to make that determination "fell largely to the arresting * * * agent." Pet. App. 67a (citing *OIG Report* 17-18, 126-127, 158 (J.A. 68-69, 240-242, 292)). Detainees on the INS's nationwide custody list were placed in a variety of federal, local, and private facilities across the United States. *OIG Report* 2 (J.A. 44-45). A total of 84 detainees were housed at the MDC for varying periods between September 14, 2001, and August 27, 2002. *Id.* at 111 (J.A. 219). Those detainees were placed in the MDC's Administrative Maximum Special Housing Unit (ADMAX SHU), ensuring that they were subjected to the most restrictive conditions of confinement authorized by Bureau of Prisons policy. *Id.* at 111-112 (J.A. 219-220); *Iqbal*, 556 U.S. at 667-668.

Not every alien was subjected to the hold-until-cleared policy in the same manner. Acting independ-

ently and without the knowledge of FBI and INS headquarters, see *OIG Report* 54 (J.A. 124), the FBI and INS field offices in New York decided that all aliens they arrested in connection with a lead related to the September 11 investigation would be held until cleared without any additional determination that there was evidence tying those aliens to terrorism. *Id.* at 53-54 (J.A. 123-124); Pet. App. 37a-38a.[3] Some of the aliens on the resulting "New York List" of detainees were confined in the ADMAX SHU at the MDC, but the vast majority were detained under less-restrictive conditions with the general population at the Passaic County Jail in New Jersey. Pet. App. 130a, 152a-153a.

INS headquarters learned of the New York List in October 2001. *OIG Report* 53-54 (J.A. 122-124). That discovery triggered two Justice Department meetings to discuss whether the detainees on the New York List should continue to be held without bail. *Id.* at 55-56 (J.A. 125-128). Neither the Attorney General nor the FBI Director was present at those meetings. *Ibid.* At their conclusion, Associate Deputy Attorney General Stuart Levey decided that the detainees on the New York List should be added to the nationwide INS custody list, thus ensuring that the hold-until-cleared policy would continue to be applied to them. *Ibid.* He explained during the Inspector General's later investigation that "he wanted to err on the side of caution so that a terrorist would not be released by mistake." *Id.* at 56 (J.A. 128).

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[3] The Inspector General attributed that decision to the "long history" that "federal law enforcement organizations in New York City" have of "taking actions independent of direction from their Washington, D.C., headquarters." *OIG Report* 54 (J.A. 124).

2. Respondents were detained in the ADMAX SHU at the MDC for periods ranging from three to eight months. Pet. App. 2a, 253a-254a (Compl. ¶ 4). In light of respondents' immigration status, it was undisputedly lawful to arrest and detain them pending their removal from the United States. *Id.* at 2a & n.1; see *Iqbal*, 556 U.S. at 682; *Turkmen* v. *Ashcroft*, 589 F.3d 542, 549-550 (2d Cir. 2009). But respondents argue that the restrictive conditions of their confinement violated their substantive-due-process rights because the government allegedly lacked any individualized information indicating that they were dangerous or involved in terrorism. Pet. App. 253a-254a (Compl. ¶ 4), 265a-267a (¶¶ 39-44). Respondents further contend that the conditions violated their equal-protection rights because they were allegedly singled out for such treatment on account of being (or being perceived as) Muslim and either Arab or South Asian. *Id.* at 255a (¶ 6), 342a-343a (¶¶ 276-283).

Respondents' substantive-due-process and equal-protection claims are brought against two groups of defendants: (1) the "DOJ Defendants" (former Attorney General Ashcroft, former FBI Director Mueller, and former INS Commissioner James Ziglar), and (2) the "MDC Defendants" (for present purposes, a former warden and former associate warden of the MDC). Pet. App. 3a n.2, 258a-261a (Compl. ¶¶ 21-28), 342a-343a (¶¶ 276-283). The equal-protection portion of those claims is echoed in a separate claim that the DOJ Defendants and the MDC Defendants conspired with each other to deprive respondents of the equal

protection of the laws, in violation of 42 U.S.C. 1985(3). Pet. App. 347a (¶¶ 303-306).[4]

3. The DOJ and MDC Defendants moved to dismiss the complaint for three principal reasons: (1) that the judicially inferred remedy under *Bivens* should not extend to some of the claims; (2) that defendants are entitled to qualified immunity; and (3) that plaintiffs failed to state a claim. Pet. App. 5a. The district court granted defendants' motions in part and denied them in part. *Id.* at 164a-236a. The court dismissed the claims against the DOJ Defendants (Ashcroft, Mueller, and Ziglar) in their entirety, finding that respondents had not adequately alleged that those defendants were personally involved in—or even aware of—the creation of conditions of confinement so restrictive as to constitute a substantive-due-process violation. *Id.* at 196a-199a. The court also held that respondents' equal-protection claim fails in light of *Iqbal* because their allegations "do not plausibly suggest that the DOJ Defendants purposefully directed the detention of [respondents] in harsh conditions of confinement due to their race, religion or national origin." *Id.* at 209a. The court rejected respondents' suggestion that a punitive intent could be inferred "from the DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully*." *Id.* at 198a.

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[4] In claims not at issue here, respondents also allege First and Fifth Amendment violations (based on restrictions on their communications with family or counsel or on their ability to practice and observe their religion), as well as Fourth and Fifth Amendment violations (based on allegations that they were subjected to excessive, unreasonable, and deliberately humiliating strip searches). Pet. App. 343a-347a (Compl. ¶¶ 284-302).

The district court denied the motion to dismiss with respect to several of the claims against the MDC Defendants, finding sufficient allegations of their personal involvement in restrictive conditions or abusive conduct, and finding that those defendants are not entitled to qualified immunity. Pet. App. 199a-203a, 209a-211a. The court rejected the argument (made by both the DOJ and MDC Defendants) that it should decline to extend the *Bivens* remedy to the substantive-due-process claim, stating that "conditions-of-confinement claims do not present a new context" for the application of *Bivens*. *Id.* at 193a n.10.

4. The MDC Defendants appealed, and respondents cross-appealed the dismissal of the claims against the DOJ Defendants. Pet. App. 19a-20a. The panel majority ruled for respondents on most issues. *Id.* at 1a-86a. The following discussion focuses on the panel's resolution of the claims against the DOJ Defendants (including petitioners Ashcroft and Mueller).

a. The court of appeals first held that "a *Bivens* remedy is available for [respondents'] punitive conditions of confinement * * * claims against both the DOJ and the MDC Defendants." Pet. App. 22a. The court acknowledged that "the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Ibid.* (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)). It concluded, however, that the claims in this case do not present a new "context" and therefore do not require any extension of *Bivens*. *Id.* at 24a-29a & n.17. In the court's view, respondents' substantive-due-process and equal-protection claims "stand[] firmly within a familiar *Bivens* context" because (i) courts in some prior cases have entertained

Bivens claims for the same allegedly injured rights, and (ii) other courts, in the context of different constitutional rights, have entertained *Bivens* claims premised on the same "mechanism of injury (punitive conditions without sufficient cause)." *Id.* at 24a-25a. The court therefore held that it did not need to consider "whether special factors counsel hesitation in creating a *Bivens* remedy." *Id.* at 29a n.17 (citation omitted).

b. The court of appeals next held that respondents had adequately alleged a substantive-due-process claim, based on the restrictive conditions of their confinement, against the DOJ Defendants. Pet. App. 30a-49a. In so holding, however, the court declined to rely on respondents' theory that application of the hold-until-cleared policy to aliens detained in the course of the September 11 investigation was unconstitutional from the outset. The court recognized that respondents could be lawfully arrested and detained, and that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on any September 11 detainee for whom the government had "individualized suspicion of terrorism." *Id.* at 31a. The court also acknowledged that, to the extent some individuals on the New York List had initially been confined in the ADMAX SHU without individualized suspicion, the DOJ Defendants "did not create the particular conditions in question" because the "initial arrest and detention mandate" did not "require[] subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism." *Ibid.* The court therefore rejected respondents' constitutional objections both to the original detention order and to the confinement at the ADMAX SHU of detainees on "the national INS

List," for whom the government had "a suspicion that they were connected to terrorist activities." *Id.* at 31a-32a.

The court of appeals nevertheless held that respondents' complaint plausibly sets forth a theory of liability that respondents themselves had not advanced. Pet. App. 32a n.21. The court found it plausible that the DOJ Defendants had violated respondents' substantive-due-process rights by deciding (or approving of the decision) to merge the New York List with the national INS List and to continue to subject all detainees to the hold-until-cleared policy. *Id.* at 32a-33a. The court explained that, as a result of that decision, "some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement," even though there had been no express determination that they were suspected of having any terrorism connections. *Id.* at 39a. The court found that, in the absence of such an individualized determination, "it would be unreasonable * * * to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." *Id.* at 43a. The court inferred that continued detention in such circumstances was "punitive" and therefore a substantive-due-process violation under *Bell* v. *Wolfish*, 441 U.S. 520 (1979). Pet. App. 44a-48a.

In addressing the DOJ Defendants' qualified-immunity argument, the court of appeals concluded that the constitutional right alleged to have been violated was clearly established because any "condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees,"

and "because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances." Pet. App. 48a, 49a.

c. The court of appeals also held that respondents had adequately alleged an equal-protection claim against the DOJ Defendants. Pet. App. 61a-68a. Again, the court rejected respondents' theory of liability, relying instead on its own lists-merger theory. The court found it "reasonable to infer that [the DOJ Defendants] possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner." *Id.* at 64a. The court presumed the truth of respondents' assertion that the DOJ Defendants had personally "condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement." *Ibid.*

For qualified-immunity purposes, the court of appeals found it "clearly established at the time of [respondents'] detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a.

d. Finally, the court of appeals held that respondents had "plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim." Pet. App. 81a. The court noted respondents' allegation of a "tacit agreement" between the DOJ Defendants and two of the MDC Defendants "to effectuate the harsh conditions of confinement with discriminatory intent." *Ibid.*

Even though it had been unclear in 2001 whether the conspiracy statute applied to federal officials, the court concluded that respondents could not claim qualified immunity because "federal officials could not reasonably have believed that it was legally permissible for them to conspire * * * to deprive a person of equal protection of the laws." *Id.* at 83a (citation omitted).

e. Judge Raggi concurred in the judgment in part and dissented in part. Pet. App. 86a-163a. She observed that the decision made the Second Circuit the first court of appeals "to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials * * * for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001." *Id.* at 86a-87a. She would have affirmed the dismissal of respondents' claims on multiple grounds.

First, Judge Raggi concluded that the *Bivens* remedy should not be extended to the novel context of this case, which involves a challenge to policy decisions that implicate the Executive's immigration and national-security authorities, when Congress had been informed of concerns about treatment of the September 11 detainees and had failed to provide any damages remedy. Pet. App. 90a-118a. Second, she concluded that the DOJ Defendants are entitled to qualified immunity because it was not clearly established in 2001 that their conduct (even under the majority's theory) violated respondents' constitutional rights. *Id.* at 137a-145a, 155a-158a. And third, she concluded that the DOJ Defendants are also entitled to qualified immunity because there are insufficient allegations of their personal involvement in any substantive-due-

process or equal-protection violations. *Id.* at 122a-137a, 148a-155a.[5]

5. The DOJ Defendants and the MDC Defendants sought rehearing en banc. Because the 12 participating judges split evenly, rehearing was denied. Pet. App. 238a. Judges Pooler and Wesley, the authors of the panel majority opinion, filed a short opinion concurring in the denial. *Id.* at 238a-240a. They reaffirmed their belief that respondents had "plausibly" pleaded that "the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy" by "endors[ing] the restrictive detention of a number of men who were Arabs or Muslims or both." *Id.* at 239a. They concluded that, after 13 years, "it is time to move the case forward." *Id.* at 240a.

Six members of the court—Judges Jacobs, Cabranes, Raggi, Hall, Livingston, and Droney—filed a joint dissent from the denial of rehearing en banc. Pet. App. 240a-250a. While expressly incorporating Judge Raggi's prior dissent from the panel's decision, they further explained that the panel's decision did not comport with this Court's precedents in three areas of the law: "(1) the narrow scope of *Bivens* actions, (2) the broad shield of qualified immunity, and (3) the pleading standard for plausible claims." *Id.* at 241a. Although the dissenters "focus[ed]" on the panel's decision "to allow [respondents] to pursue damages against the Attorney General and FBI Director," they also endorsed Judge Raggi's view that the "claims against other officials should also be dismissed." *Id.* at 249a-250a n.16.

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[5] For the same reasons that she would have dismissed the equal-protection claim, Judge Raggi would also have dismissed the Section 1985(3) conspiracy claim. Pet. App. 158a n.46.

SUMMARY OF ARGUMENT

The court of appeals held that the former Attorney General of the United States and the former Director of the FBI may be subjected to discovery, other demands of further litigation, and potential damages liability in their individual capacities for unintended consequences arising from the implementation of policy decisions they made 15 years ago during an unprecedented national-security crisis. That conclusion was erroneous for three independent reasons.

I. The judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should not be "extend[ed] * * * into any new context," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001), without a consideration of whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation," *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). The court of appeals failed to heed that admonition, holding instead that a *Bivens* claim may proceed whenever the "rights injured" and the "mechanism of injury" have antecedents in prior *Bivens* suits. Pet. App. 24a-25a. That misconception of the relevant "context" caused the court of appeals to overlook three salient features of respondents' claims. Respondents seek to challenge (1) high-level policy decisions that implicate both (2) national security and (3) immigration. Taken together, those features make the context of this case a novel one for *Bivens* purposes, and they counsel decisively against expanding the *Bivens* remedy in the absence of congressional authorization.

II. The court of appeals also erred in holding that petitioners are not entitled to qualified immunity. Even assuming *arguendo* that respondents have plau-

sibly alleged that petitioners personally condoned or endorsed a decision to merge two lists of September 11 detainees, it was not clearly established at the time of petitioners' actions that continued confinement in restrictive conditions under the hold-until-cleared policy was unjustified and therefore necessarily attributable to punitive or discriminatory intentions. In concluding otherwise, the court of appeals defined the relevant legal question at too high a level of generality, committing a mistake that this Court has often had to correct.

The "dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). The court of appeals, however, did not address the situation petitioners confronted. Instead, it reasoned only from the general proposition that a particular condition of confinement "not reasonably related to a legitimate governmental objective" is punishment in violation of the constitutional rights of "ordinary civil detainees." Pet. App. 43a, 48a-49a, 65a-66a.

Respondents were not ordinary civil detainees. They had already been arrested pursuant to the September 11 investigation, placed in the MDC, and subjected to the hold-until-cleared policy before it was discovered that, for an unknown portion of the members of the New York List, arresting officers had failed to conduct the same initial vetting that detainees on the national INS list had received. The appropriate question is whether such individuals had a clearly established right to be immediately released from restrictive confinement once it came to light that, in some instances, arresting officers had failed to conduct

the same initial vetting that other September 11 detainees received. Neither the court of appeals nor respondents cite any decision indicating, much less clearly establishing, that in the unprecedented circumstances of this case, continuing to apply the hold-until-cleared policy to respondents was so arbitrary as to constitute an impermissibly punitive or impermissibly discriminatory act.

That error is fatal to the court of appeals' qualified-immunity conclusions with respect to respondents' constitutional and statutory claims. The court further erred in analyzing qualified immunity for respondents' statutory claim, by disregarding acknowledged uncertainty in the Second Circuit at the time of the underlying events about whether 42 U.S.C. 1985(3) even applies to conspiracies among federal officials.

III. Finally, in evaluating the sufficiency of respondents' pleadings, the court of appeals did not faithfully apply this Court's decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). In *Iqbal*, the Court refused to credit the plaintiff's assertions that the hold-until-cleared policy—the same policy challenged by respondents—was motivated by an invidious purpose. The Court in *Iqbal* identified "more likely explanations" for that policy, including the "'obvious alternative explanation'" that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 681-682, 683 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007)).

The court of appeals appropriately declined to credit respondents' assertions—functionally identical to those advanced in *Iqbal*—that the hold-until-cleared

policy was unconstitutional from its inception. But the court's own lists-merger theory of liability is equally inconsistent with *Iqbal*. Even aside from its dependence on speculation about petitioners' personal involvement in the lists-merger decision, that theory of liability founders because the most likely explanation for the decision is unconnected to any discriminatory purpose. Here, as in *Iqbal*, the obvious alternative explanation for the decision was a nondiscriminatory and understandable "concern that[,] absent further investigation, 'the FBI could unwittingly permit a dangerous individual to leave the United States.'" Pet. App. 19a (quoting *OIG Report* 53 (J.A. 123)); see *Iqbal*, 556 U.S. at 683.

ARGUMENT

As the six dissenting members of the court of appeals explained, the decision below departed from "controlling Supreme Court precedent" in "three areas of law." Pet. App. 243a. First, the court of appeals erroneously refused even to consider whether the unprecedented context of this case—in which respondents seek to impose damages liability upon the former Attorney General and former FBI Director for actions taken in the early weeks of the massive investigation into the September 11, 2001 terrorist attacks—counseled hesitation before extending the civil remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Second, the court erroneously concluded that the decision to subject respondents to restrictive conditions of confinement was a violation of constitutional rights that were clearly established in 2001 (and did not even attempt to explain how it was a violation of clearly established rights under 42 U.S.C. 1985(3)). Third, in

analyzing the sufficiency of respondents' allegations at the pleading stage, the court erroneously refused to apply the reasoning that this Court applied to materially identical allegations in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Each of those errors independently requires reversal.

I. Special Factors Counsel Against Extending The Judicially Inferred *Bivens* Remedy To This Challenge To High-Level Executive Policymaking At The Confluence Of National Security And Immigration

This Court has "consistently and repeatedly recognized" the need for "caution toward extending *Bivens* remedies into any new context." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). The court of appeals adopted a blinkered approach to evaluating the relevant context and erroneously concluded that this extraordinary case "stands firmly within a familiar *Bivens* context." Pet. App. 25a. It therefore did not address whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation." *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). See Pet. App. 29a n.17. Because respondents challenge high-level policy decisions implicating both national security and immigration, the case does implicate special factors that counsel against inferring a damages remedy in the absence of congressional authorization.[6]

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[6] Petitioners Ashcroft and Mueller opposed the extension of *Bivens* in the district court but did not repeat that argument as an alternative ground of affirmance before the court of appeals panel. See Pet. App. 21a. Petitioners did, however, include the issue in their petition for rehearing en banc (at 11-13). In any event, because the question was passed upon by the court of appeals, see Pet. App. 21a-29a, it may be reviewed by this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

A. This Case Does Not Arise In A Familiar *Bivens* Context

1. In its 1971 decision in *Bivens*, the Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 556 U.S. at 675 (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search and arrest. *Bivens*, 403 U.S. at 389. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

The *Bivens* Court "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has more recently "retreated" because they reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.*, 534 U.S. at 67 & n.3 (citation omitted). Because such "implied causes of action" are now "disfavored," the Court has been "reluctant to extend *Bivens* liability to any new context or new category of defendants." *Iqbal*, 556 U.S. at 675 (citation and internal quotation marks omitted). For more than 35 years, the Court "ha[s] consistently refused to extend *Bivens* liability." *Correctional Servs. Corp.*, 534 U.S. at 68; see *id.* at 74; *Minneci* v. *Pollard*, 565 U.S. 118, 124-125 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007); *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 & n.3 (1988); *United States* v. *Stanley*, 483 U.S. 669, 683 (1987); *Bush*, 462 U.S. at 390; *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983). The

Court has explained that, even when there is no "alternative" process for "protecting the interest" asserted by the plaintiff, courts still must "'pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie*, 551 U.S. at 550, 554 (quoting *Bush*, 462 U.S. at 378).

2. Embracing the court of appeals' analysis, respondents contend that their *Bivens* claims "arise in a familiar context" because respondents raise "a familiar constitutional claim based on a familiar mechanism of injury." Br. in Opp. 14, 16 (capitalization modified). Respondents' approach is inconsistent with this Court's decisions, and it has not been adopted by any other court of appeals. By defining both the "constitutional claim" and the "mechanism of injury" at an unduly high level of generality, that approach fails to serve the purposes of the "special factors" inquiry.

The decision below illustrates the problem. The court of appeals characterized respondents' claims at a high level of generality: "[F]ederal detainee [p]laintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions." Pet. App. 24a. The court conducted a similarly abstract inquiry in considering whether "the rights injured" and "the mechanism of injury" have any antecedents in prior *Bivens* suits. *Id.* at 24a-25a. In the court's view, the alleged "rights injured" were "substantive due process and equal protection rights," and the alleged "mechanism of injury" was "punitive conditions [of confinement] without sufficient cause." *Ibid.*

The court of appeals compounded its error by concluding that the circumstances presented here arise in a familiar "context" for purposes of *Bivens* liability

because *some* prior decisions had recognized a *Bivens* remedy for substantive-due-process or equal-protection violations, and *other* decisions had recognized such a remedy for unconstitutional conditions of confinement. Pet. App. 24a-25a & n.15, 29a n.17. Thus, the court did not even purport to identify a prior *Bivens* case that shared both attributes of the relevant "context." Rather, the court "mix[ed] and match[ed] a 'right' from one *Bivens* case with a 'mechanism of injury' from another." *Id.* at 95a (Raggi, J., dissenting).

The court of appeals' framework cannot be reconciled with the few prior decisions the court invoked. Although this Court recognized a *Bivens* action to redress an equal-protection violation involving discrimination in congressional-staff employment, see *Davis* v. *Passman*, 442 U.S. 228 (1979), it later "declined to extend *Davis* to other employment discrimination" arising in the military context, see Pet. App. 24a n.15 (citing *Chappell*, 462 U.S. at 300-304). The court of appeals attributed that difference to "the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury." *Ibid.* But the clear import of this pair of decisions is that, in deciding whether a particular *Bivens* claim arises in a familiar "context," the relevant context must be defined with specificity. Employment discrimination in the military involves a different context than does employment discrimination involving federal civilians. In light of *Davis* and *Chappell*, simply identifying the mechanism of injury as "punitive conditions without sufficient cause" (Pet. App. 25a) does not suffice to establish that the claims here arise in a "familiar context."

3. The principal error in the court of appeals' analysis of the context of respondents' *Bivens* claims, however, is the court's failure to account for "the interrelated conditions in which" the claims "exist[] or occur[]" —that is, for the "context" in which they arise. *Webster's Third New International Dictionary* 492 (1971); see *Black's Law Dictionary* 386 (10th ed. 2014) (defining "context" as "[s]etting or environment"). Here, the conditions in which respondents' *Bivens* claims arise are not the same as those in, for instance, *Carlson* v. *Green*, 446 U.S. 14 (1980), which involved an Eighth Amendment claim by a federal prisoner for deliberate indifference to his medical needs. Respondents were not garden-variety prisoners (or even ordinary pretrial detainees); their claims arise in an atypical context; and petitioners Ashcroft and Mueller in their policymaking capacity are not typical *Bivens* defendants.

As the dissenting judges below explained, multiple aspects of this case make its context a novel one for *Bivens* purposes. Pet. App. 93a-101a (Raggi, J.), 244a-245a (joint dissent). Respondents seek to challenge (1) high-level policy decisions and to do so in a context that implicates both (2) national security and (3) immigration. Other courts in considering whether to extend the *Bivens* remedy have appropriately identified each of those considerations as potentially presenting a novel context.[7] And respondents have identi-

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[7] See, *e.g.*, *Meshal* v. *Higgenbotham*, 804 F.3d 417, 423-425 (D.C. Cir. 2015) (national security), petition for cert. pending, No. 15-1461 (filed June 6, 2016); *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (en banc) (policy decisions), cert. denied, 133 S. Ct. 2796 (2013); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2012) (immigration), cert. denied, 133 S. Ct. 2336 (2013); *Lebron* v.

fied no other decision finding that remotely similar circumstances presented such a familiar *Bivens* context that the special-factors analysis could be disregarded altogether.

B. The *Bivens* Remedy Should Not Be Extended To The Novel Context Of This Case

In this case, the three special factors described above—high-level policy decisions, national security, and immigration—are "inextricably intertwined," Pet. App. 102a (Raggi, J., dissenting), and they counsel decisively against extending the *Bivens* remedy to the present context.

1. The heart of respondents' complaint expressly challenges fundamental "policy" decisions made by the Attorney General in the course of the September 11 investigation: an alleged "policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism," and "a blanket 'hold-until-cleared' policy" under which out-of-status aliens identified as being of interest to the investigation would not be released until the FBI had "affirmatively cleared them of terrorist ties." Pet. App. 252a-253a, 265a (Compl. ¶¶ 2, 39). The court of appeals' lists-merger theory of liability is similarly directed toward an alleged policy decision to continue detaining aliens arrested in conjunction with the September 11 investigation "as if there were some suspicion that those individuals were tied to terrorism, even though no such suspicion existed." *Id.* at 19a.

Rumsfeld, 670 F.3d 540, 552-556 (4th Cir.) (national security), cert. denied, 132 S. Ct. 2751 (2012); *Ali* v. *Rumsfeld*, 649 F.3d 762, 773-774 (D.C. Cir. 2011) (same); *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (policy decisions), cert. denied, 560 U.S. 978 (2010).

To be sure, the Attorney General and FBI Director are individual federal employees who are bound to follow the Constitution. But this Court has "never considered" the *Bivens* remedy to be "a proper vehicle for altering an entity's policy." *Correctional Servs. Corp.*, 534 U.S. at 74. *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers," not "deterring the conduct of a policymaking entity." *Id.* at 71; see *ibid.* ("*Bivens* from its inception has been based * * * on the deterrence of individual officers who commit unconstitutional acts."); *Meyer*, 510 U.S. at 484-486.

High-level policy decisions differ from the unauthorized actions of rogue officers in a way that bears directly on special-factors analysis. Such policies are more likely to be amenable to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and they are more likely to receive scrutiny from entities like Congress or an Inspector General—as, indeed, happened here. See *OIG Report* 37-71, 111-164 (J.A. 96-154, 218-302) (addressing the hold-until-cleared policy and the conditions of confinement at the MDC). In rejecting another *Bivens* claim against former Attorney General Ashcroft, the Second Circuit distinguished between "isolated actions of individual federal employees" and "policies promulgated and pursued by the executive branch." *Arar* v. *Ashcroft*, 585 F.3d 559, 578 (2009) (en banc), cert. denied, 560 U.S. 978 (2010). It noted that an extension of *Bivens* to high-level policies would be "without precedent" and would "implicate[] questions of separation of powers as well as sovereign immunity." *Ibid.* The Seventh Circuit similarly rejected a claim against the former Secretary of Defense, explaining that "the normal means to handle

defective policies * * * is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author." *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

Respondents contend (Br. in Opp. 23-24) that excluding high-level policy decisions from the scope of *Bivens* "would effectively grant high-ranking officials absolute immunity—the opposite of what this Court decided in *Mitchell* [v. *Forsyth*, 472 U.S. 511 (1985)]." In *Mitchell*, the Court held that the Attorney General could not assert absolute immunity for a constitutional claim arising from his decision to approve a warrantless wiretap to gather intelligence for national-security purposes. *Id.* at 520-524. *Mitchell* is inapposite here.

The decision of the Attorney General at issue in *Mitchell* was not a policy decision about how to deal with a category of cases. Instead, it was a decision, exercising the President's national-security authority, to authorize a specific wiretap. 472 U.S. at 514. Even assuming *arguendo* that the Attorney General or the FBI Director could be subject to *Bivens* liability for that sort of particularized decision, *Bivens* should not be extended to claims alleging the formulation of unconstitutional *policies*.

In addition, the Court has already rejected an attempt to conflate immunity analysis with the *Bivens* special-factors inquiry. In *Stanley*, the Court held that special factors precluded it from inferring a *Bivens* remedy for claims that unknown Army officers had violated the plaintiff's constitutional rights by secretly subjecting him to testing about the effects of LSD. 483 U.S. at 671-672, 678-686. Foreshadowing respondents' argument in this case, Justice Brennan's dissent-

ing opinion objected that the "practical result" of the Court's decision in *Stanley* was "absolute immunity from liability for money damages for all federal officials who intentionally violate the constitutional rights of those serving in the military." *Id.* at 691. The Court rejected that analogy, explaining that the special-factors inquiry "is analytically distinct from the question of official immunity from *Bivens* liability," and that there is no "reason for creating such an equivalency" between those two questions. *Id.* at 684-685 (emphasis omitted). The Court observed that "the 'special factors' limitation upon the inference of *Bivens* actions" would be "quite hollow" if it merely "duplicate[d] pre-existing immunity from suit." *Id.* at 686.

2. Here, the high-level policy decisions that respondents challenge arise at the confluence of two particular subject areas—national security and immigration—that have traditionally warranted caution about judicial intervention.

a. "[U]nless Congress specifically has provided otherwise," courts are "reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). That hesitancy reflects judicial self-awareness of courts' limited capacity to evaluate national-security judgments. It also reflects judicial recognition that, because claims involving national security are more likely to implicate classified or otherwise-restricted information, the risk of "inadvertent disclosure may jeopardize future acquisition and maintenance of the sources and methods of collect-

ing intelligence." *Lebron* v. *Rumsfeld*, 670 F.3d 540, 554 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012). In such contexts, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" and to "tailor any remedy to the problem perceived." *Wilkie*, 551 U.S. at 562 (citation omitted). "[W]hen Congress deems it necessary for the courts to become involved in sensitive matters, * * * it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns." *Lebron*, 670 F.3d at 555. For instance, Congress "created the special Foreign Intelligence Surveillance Court to consider wiretap requests in the highly sensitive area of" foreign-intelligence investigations. *Ibid.* And Congress enacted the Classified Information Procedures Act, 18 U.S.C. App. at 860, to regulate the use and disclosure of sensitive information in criminal cases. See generally *United States* v. *Yunis*, 867 F.2d 617 (D.C. Cir. 1989).

In this case, respondents seek to persuade a court that, in the absence of some unspecified quantum of "individualized suspicion," the imposition of restrictive conditions on respondents during their otherwise-valid confinement was so "arbitrary or purposeless" that it could be understood only as the product of punitive or invidious intent. Pet. App. 46a & n.31 (citing *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979)). But whether it was irrational to subject certain detainees arrested during the September 11 investigation to restrictive conditions cannot be assessed without reference to a broad range of national-security considerations, including "the 9/11 attacks, the al Qaeda terrorist organization that ordered them, the attacks' alien perpetrators, and how those aliens—and, therefore, similarly minded

others—could operate in the United States without detection." *Id.* at 109a (Raggi, J., dissenting). A court evaluating that assertion would also need to consider "the history of al Qaeda attacks on American interests *prior* to 9/11," "terrorists' frequent use of immigration fraud to conceal their murderous plans," and events that occurred after September 11 but during the time of the challenged confinement that stoked fears about potential follow-up attacks. *Id.* at 110a. Thus, a court could not find that the conditions in the ADMAX SHU bore so little relation to the Nation's security as to be "arbitrary or purposeless" without second-guessing high-level executive policies in sensitive areas.[8]

Respondents assert (Br. in Opp. 19-20) that their claims do not implicate national-security considerations because their complaint alleges that petitioners "knew there was no reason to suspect [respondents] of any connection to terrorism." But at the time petitioners allegedly ratified the lists-merger decision, they did not know that about respondents. To the contrary, what petitioners allegedly knew was that respondents had already been arrested in connection with the September 11 investigation and that the arresting agents had determined that they should be detained at the

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[8] Such second-guessing would be particularly inappropriate in light of the nature of the lists-merger decision. To the extent that petitioner Ashcroft allegedly "endorsed the restrictive detention" of respondents (Pet. App. 239a (Pooler and Wesley, JJ., concurring in the denial of rehearing)), his decision would have constituted an exercise of discretion about whether to rescind a decision already made by lower-level officials. Such a challenge implicates additional concerns about potential interference with policymakers' ability to prioritize how best to deploy scarce law-enforcement resources—including their own personal attention and energy—during operations like the massive September 11 investigation.

MDC, rather than at another facility such as the Passaic County Jail. See pp. 4-5, *supra*. The decision to continue confining respondents in restrictive conditions under the hold-until-cleared policy was rooted in a desire "to err on the side of caution so that a terrorist would not be released by mistake" while the Executive worked to determine whether aliens such as respondents should continue to be deemed "of interest" to the investigation. *OIG Report* 56 (J.A. 128). The need to conduct a further investigation to clear respondents of any terrorist connections shows that their detention implicated the kinds of national-security considerations that counsel judicial hesitation.

b. Similar prudential principles animate courts' hesitation to infer *Bivens* remedies for claims intimately related to immigration. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Such policies are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" unless Congress has authorized judicial scrutiny. *Id.* at 589. And the fact that "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration," *Mirmehdi* v. *United States*, 689 F.3d 975, 982 (9th Cir. 2012) (quoting *Arar*, 585 F.3d at 572), cert. denied, 133 S. Ct. 2336 (2013), further counsels against judicial inference of additional extra-statutory remedies.

Respondents assert (Br. in Opp. 18) that their challenge has nothing to do with immigration proceedings

or immigration law. But the conditions-of-confinement policies that respondents challenge applied only to aliens who, in addition to being arrested during the September 11 investigation, were being detained for apparent violations of U.S. immigration laws. The principles undergirding courts' reluctance to infer *Bivens* remedies in other immigration-related cases apply with full force here.

3. Finally, respondents seek to minimize the importance of the three considerations discussed above by arguing that, in isolation, none of them would suffice to preclude a *Bivens* remedy. See Br. in Opp. 18-24. Even assuming that were generally true, respondents' divide-and-conquer approach would still miss the point here. Those considerations *taken together* make up the relevant *Bivens* "context" and constitute special factors that should preclude the extension, without congressional authorization, of a damages remedy.

II. Petitioners Are Entitled To Qualified Immunity Because It Was Not Clearly Established, At The Time Of Petitioners' Allegedly Wrongful Conduct, That Aliens Legitimately Arrested During The September 11 Investigation Could Not Be Subjected To Restrictive Conditions Of Confinement Until They Were Cleared Of Any Connections With Terrorism

Even assuming *arguendo* that respondents have plausibly alleged that petitioner Ashcroft or Mueller personally condoned or endorsed a decision to merge two lists of September 11 detainees (but see pp. 40-49, *infra*), petitioners would still be entitled to qualified immunity because, at the time of their allegedly unconstitutional actions, it was not clearly established that continued confinement in restrictive conditions under the hold-until-cleared policy in the wake of the

September 11 attacks was unjustified and therefore necessarily attributable to punitive or discriminatory intentions. In concluding otherwise, the court of appeals defined the relevant legal questions at too high a level of generality, committing a mistake that this Court has often had to correct to ensure that qualified immunity continues to serve its vital purpose of protecting "all but the plainly incompetent or those who knowingly violate the law." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

1. Qualified immunity "shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix*, 136 S. Ct. at 308 (citations and internal quotation marks omitted). For three decades, this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Ibid.* (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011)); see, *e.g.*, *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 n.5 (2012); *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

With respect to all three claims at issue here (*i.e.*, the substantive-due-process claim, the equal-protection claim, and the statutory claim alleging a conspiracy to deprive persons of equal-protection rights), the court of appeals flouted that long-standing instruction.

2. With respect to respondents' substantive-due-process claim, the court of appeals did not doubt that respondents were lawfully arrested, that respondents could be lawfully detained, or that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on those for whom the government had "individualized suspicion of terrorism." Pet. App. 31a. The court correctly rejected respondents' allegation that the hold-until-cleared policy was punitive from the outset, given the "obvious" and "more likely explanation[]" for that policy identified by this Court in *Iqbal*: a "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." 556 U.S. at 681-682; see Pet. App. 122a-123a (Raggi, J., dissenting). The court nevertheless held that petitioners Ashcroft and Mueller lacked qualified immunity from damages liability for applying the hold-until-cleared policy to individuals on the New York List. That holding was misconceived.

a. Under the court of appeals' lists-merger theory, detainees on the New York List were deemed the equivalent of "ordinary civil detainees" because it was eventually discovered that some individuals on that list had been arrested and detained in connection with the September 11 investigation but without any separate determination that there was evidence linking them to terrorism. Pet. App. 39a, 43a. Thus, when the court addressed qualified immunity, it held simply that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees," and that "a pretrial detainee's

right to be free from punishment does not vary with the surrounding circumstances." *Id.* at 48a, 49a.

Those general formulations failed to account for the actual circumstances that confronted petitioners Ashcroft and Mueller when they allegedly condoned the merger of the two lists of detainees. The relevant question is not whether "ordinary civil detainees" or "pretrial detainee[s]" (Pet. App. 43a, 49a) could have been held in the restrictive conditions at the ADMAX SHU. Respondents were not ordinary civil or pretrial detainees. They had already been arrested pursuant to the September 11 investigation, placed in the MDC, and subjected to the hold-until-cleared policy before it was discovered that, for an unknown portion of the members of the New York List, arresting officers had failed to conduct the same initial vetting that detainees on the national INS list had received.

The court of appeals recognized that respondents' violation of U.S. immigration law justified their confinement (albeit in less restrictive conditions). Pet. App. 47a, 75a. But neither the court of appeals nor respondents have identified any decision indicating, much less clearly establishing as of late 2001, that continuing to apply the hold-until-cleared policy to aliens on the New York List was so "arbitrary or purposeless to national security" as to be unconstitutional. *Id.* at 141a (Raggi, J., dissenting). To the contrary, petitioners could reasonably have thought that their actions—justified as they were by "obvious and legitimate interest[s]," *id.* at 140a—were lawful. In the two years before the September 11 attacks, other detainees charged with or convicted of terrorism-related offenses had incited acts of violence outside prisons and had carried out violent attacks inside prisons. *Id.*

at 143a (citing *United States* v. *Stewart*, 590 F.3d 93, 163-165 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part), cert. denied, 559 U.S. 1031 (2010), and *United States* v. *Salim*, 690 F.3d 115, 119-120 (2d Cir. 2012), cert. denied, 133 S. Ct. 901 (2013)). Placing the September 11 detainees in restrictive conditions limited the risk that they would "communicate in ways that either furthered terrorist plans or thwarted government investigations." *Id.* at 143a. It also limited the risk that, while an individual clearance investigation was pending, an "as-yet-unidentified terrorist associate would threaten either national or prison security." *Ibid.*

b. The court of appeals cited just two precedents in support of its qualified-immunity analysis of respondents' substantive-due-process claim. Neither decision spoke with the requisite specificity. The court cited *Wolfish*, 441 U.S. at 535-539 & n.20, for the proposition that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 48a. That bare recitation of the elements of a substantive-due-process claim cannot establish, much less *clearly* establish, that the restrictions in this case were so unrelated to national security as to violate respondents' constitutional rights. The court's reliance on *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd on other grounds, 556 U.S. 662 (2009), was even more misplaced. That decision, which was issued nearly six years after the lists-merger decision (and which was later reversed by this Court on other grounds), relied on *Wolfish* in holding that qualified immunity did not

protect these very petitioners from an identical substantive-due-process claim. See 490 F.3d at 168-169.

c. Even if respondents were indistinguishable from other pretrial detainees, the conditions of their confinement did not violate any constitutional norm that was clearly established at the requisite level of specificity when petitioners acted in late 2001. A considerable body of law pre-dating the lists-merger decision indicated that individualized suspicion was not categorically required to impose restrictive conditions of confinement on lawfully arrested detainees when those conditions reasonably related to a legitimate government objective. In *Block* v. *Rutherford*, 468 U.S. 576 (1984), the Court rejected a constitutional challenge to a policy barring contact visits for all pretrial detainees at the Los Angeles County Central Jail, recognizing that "identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task." *Id.* at 587. In *Wolfish*, the Court rejected a constitutional challenge to a policy mandating post-contact-visit body-cavity searches for all detainees at the Metropolitan Correctional Center in New York, even though such searches had only once uncovered concealed contraband. 441 U.S. at 558. And in *Whitley* v. *Albers*, 475 U.S. 312 (1986), the Court rejected a constitutional challenge to a policy authorizing prison guards to use potentially lethal force against prisoners to quell prison riots involving hostages. *Id.* at 316. More than a decade after the events at issue in this case, this Court rejected a constitutional challenge to a policy that mandated visual strip searches of all arrestees being admitted to certain New Jersey county jails. See *Florence* v. *Board of Chosen Freeholders of the County of Burling-*

ton, 132 S. Ct. 1510, 1523 (2012). Such decisions demonstrate that a restrictive jail or prison policy may under some circumstances be reasonably related to the legitimate governmental objective of maintaining security even when it is applied categorically, without individualized suspicion.

d. The court of appeals' decision is contrary to this Court's repeated admonitions that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743; see *ibid.* (explaining that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") (citation omitted). As Judge Raggi observed, it is impossible to "conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy." Pet. App. 120a. The six-judge dissent in the court of appeals bolsters petitioners' entitlement to qualified immunity,[9] as does the Inspec-

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[9] See *al-Kidd*, 563 U.S. at 743 (citing eight-judge dissent from denial of rehearing in finding that former Attorney General Ashcroft "deserve[d] qualified immunity" for an alleged policy about detention of terrorism suspects); *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). The qualified-immunity analysis of the six dissenting judges below was ultimately based on the absence of any clearly established right in the context of this case, rather than on a square conclusion that, if the pleadings had otherwise been adequate, there would still have been no constitutional violation. Pet. App. 246a-247a. But one side of the lower-court disagreement mentioned in *Wilson* was also based on decisions finding only that a right was not clearly established. See 526 U.S. at 618 (citing, *inter alia*, *Wilson* v. *Layne*, 141 F.3d 111, 118-119 (4th Cir. 1998), aff'd, 526 U.S. 603 (1999), and *Parker* v. *Boyer*, 93 F.3d 445 (8th

tor General's conclusion, with the benefit of hindsight, that the decision to merge the lists was "supportable, given the desire not to release any alien who might be connected to the attacks or terrorism." *OIG Report* 71 (J.A. 153).

3. For similar reasons, petitioners are also entitled to qualified immunity on respondents' equal-protection claim. As with the substantive-due-process claim, the court of appeals' inference of unconstitutional purpose turned on the court's view that "there was no legitimate reason to [continue to] detain [respondents] in the challenged conditions" when "the DOJ Defendants knew that the government lacked information tying [respondents] to terrorist activity, but decided to merge the lists anyway." Pet. App. 65a-66a. But neither the court nor respondents have cited any decisions holding that continuing restrictive conditions of confinement to address legitimate national-security concerns was so unreasonable as to give rise to an inference of discriminatory intent under the equal-protection component of the Due Process Clause.

The court of appeals cited only its prior decision in *Iqbal* v. *Hasty* for the proposition that government officials may not "hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a. As with its substantive-due-process counterpart, however, that gen-

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Cir. 1996), cert. denied, 519 U.S. 1148 (1997)). Moreover, the dissenters below strongly implied that they may have disagreed with the panel majority about the underlying merits as well, since the dissenters noted "considerable precedent * * * suggest[ing] that restrictive confinement of lawfully detained persons can be based on general, rather than individualized, suspicion of dangerousness." Pet. App. 247a.

eral statement does not come close to establishing, much less clearly establishing, that the restrictions in this case were so clearly unrelated to national security as to compel the inference that they must have been motivated by discriminatory intent. The same is true for the array of equal-protection decisions identified by respondents in their effort to flesh out the court's conclusory analysis. See Br. in Opp. 31-32 (citing, *inter alia*, *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954)). None of those cases involved circumstances remotely similar to the actual "situation [petitioners] confronted." *Saucier*, 533 U.S. at 202.

Thus, as of late 2001, "no clearly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance." Pet. App. 157a-158a (Raggi, J., dissenting).

4. Respondents also allege that the DOJ and MDC Defendants conspired to deprive respondents of equal protection of the laws, in violation of 42 U.S.C. 1985(3). Pet. App. 347a (Compl. ¶¶ 303-306). The court of appeals' rejection of qualified immunity on that claim was doubly flawed. First, the absence of any clear deprivation of respondents' equal-protection rights (as discussed above) is a sufficient ground for concluding that petitioners did not violate any obligation clearly established by Section 1985(3). See *id.* at 158a n.46 (Raggi, J., dissenting). Second, because it was unclear in 2001 whether Section 1985(3) even applied to federal officials, petitioners' conduct could not have violated any clearly established obligation under that *statute*, regardless of the clarity with which the relevant *constitutional* rules had been defined.

In holding that uncertainty about Section 1985(3)'s applicability to federal officials did not entitle petitioners to qualified immunity, the court of appeals simply followed its prior decision in *Iqbal* v. *Hasty*, *supra*. Pet. App. 83a-84a. There, the court acknowledged that, at least within the Second Circuit, "it was not clearly established in 2001 that section 1985(3) applied to federal officials." 490 F.3d at 176. The court nevertheless concluded that, as long as an equal-protection right had been established by *some* provision of law at the time the defendant acted, it did not matter for qualified-immunity purposes whether the "*source*" of that right was the Constitution or the statute. *Id.* at 177 (citation omitted).

That rationale cannot be squared with this Court's decisions, which have consistently recognized that qualified immunity applies unless the defendant's actions clearly violated the *specific* right that provides the basis for the plaintiff's claim. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation."). Qualified immunity therefore is not "defeated where a defendant violates *any* clearly established duty." *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994). Instead, the "clearly established right" must "be the federal right on which the claim for relief is based." *Ibid.*; see *Reichle*, 132 S. Ct. at 2093 ("To be clearly established" for qualified-immunity purposes, "a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates *that right*.") (emphasis added; brackets, citations, and internal quotation marks omitted).

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The six dissenters below correctly concluded that the court of appeals had erred by denying "qualified immunity in the unprecedented circumstances of this case." Pet. App. 247a. As it has repeatedly done in recent cases where the unlawfulness of particular actions had not been clearly established at the time of the underlying conduct,[10] this Court should correct the court of appeals' misapplication of qualified-immunity principles and confirm—more than 14 years after this case began—that the former Attorney General and FBI Director cannot be compelled to defend against the claims for money damages set forth in respondents' complaint.

III. Respondents Have Not Plausibly Alleged That Petitioners Personally Condoned The Implementation Of Facially Constitutional Policies In A Discriminatory Or Unreasonably Harsh Manner

Finally, the court of appeals did not faithfully apply the pleading standard required by *Ashcroft* v. *Iqbal*, *supra*. That error, too, independently warrants reversal.

1. As the court of appeals recognized, *Iqbal* "significant[ly] * * * altered" the legal landscape of this case. Pet. App. 4a. First, the *Iqbal* Court reaffirmed that a complaint must be dismissed unless it "contain[s] sufficient factual matter, accepted as true, to

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[10] See, *e.g.*, *Mullenix*, 136 S. Ct. at 308-312; *Taylor* v. *Barkes*, 135 S. Ct. 2042, 2044-2045 (2015) (per curiam); *City & County of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1775-1778 (2015); *Carroll* v. *Carman*, 135 S. Ct. 348, 350-352 (2014) (per curiam); *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2022-2024 (2014); *Wood* v. *Moss*, 134 S. Ct. 2056, 2066-2070 (2014); *Stanton* v. *Sims*, 134 S. Ct. 3, 5-7 (2013) (per curiam); *Reichle*, 132 S. Ct. at 2093-2097; *al-Kidd*, 563 U.S. at 741-744.

'state a claim to relief that is plausible on its face.'" 556 U.S. at 678 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," and a complaint does not cross that threshold by "plead[ing] facts that are 'merely consistent with' a defendant's liability." *Ibid.* (quoting *Bell Atl. Corp.*, 550 U.S. at 557). Second, the Court in *Iqbal* held that *Bivens* claims cannot go forward based on allegations of supervisory liability. *Id.* at 676. A *Bivens* plaintiff therefore must "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ibid.*; see *id.* at 677 ("[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.").

The *Iqbal* Court applied those principles in ordering dismissal of allegations functionally identical to the ones respondents make here. The plaintiff in *Iqbal* claimed that he had been detained in the MDC's ADMAX SHU in accordance with a policy of "classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin." 556 U.S. at 682. The Court concluded that, although "other defendants * * * may have labeled [plaintiff] a person 'of high interest' for impermissible reasons," no plausible allegation linked Attorney General Ashcroft or Director Mueller to those actions. *Id.* at 682-683. The Court found the absence of such an allegation decisive, explaining that Ashcroft and Mueller could not be held personally liable under *Bivens* for the unconstitutional conduct of their subordinates. *Id.* at 683.

The Court in *Iqbal* also refused to credit the plaintiff's assertions that the hold-until-cleared policy and

the FBI's arrests were motivated by a discriminatory purpose. The Court deemed those conclusory assertions implausible in light of "more likely explanations." 556 U.S. at 681. The most "'obvious alternative explanation,'" the Court explained, was that the arrests "were likely lawful and justified by [a] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682 (quoting *Bell Atl. Corp.*, 550 U.S. at 567). In this Court's view, the policy of imposing restrictive conditions of confinement on September 11 detainees "plausibly suggest[ed]" only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

2. Like the plaintiff in *Iqbal*, respondents allege that Attorney General Ashcroft intended all along for the September 11 investigation to "target[] innocent Muslims and Arabs," and that Director Mueller "knowingly joined" "the Ashcroft sweeps" and "the hold-until-cleared policy." Pet. App. 265a (Compl. ¶ 41) (capitalization altered). According to respondents, only "invidious animus against Arabs and Muslims" could explain those decisions. *Id.* at 272a (¶ 60). Respondents further allege that Ashcroft and Mueller "authorized [respondents'] prolonged detention in restrictive conditions," *id.* at 276a (¶ 67), and that their decision to authorize such treatment could have been motivated only by an impermissible punitive intent, *id.* at 342a (¶ 278). In *Iqbal*, however, the Court held that such inferences were not sufficiently plausible to survive a motion to dismiss, in light of the obvious alter-

native explanation that the challenged actions "were likely lawful and justified by [a] nondiscriminatory"—and nonpunitive—intention "to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." 556 U.S. at 682.

Perhaps because of *Iqbal*, the court of appeals eschewed respondents' theory of liability. It recognized that Ashcroft's "arrest and detention mandate" was facially legitimate and that "the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner." Pet. App. 31a. The court nevertheless constructed its own theory about how—in light of unanticipated developments in the massive September 11 investigation—Ashcroft and Mueller could be deemed "responsible for a decision to merge" two lists of detainees and therefore to have "condoned" discriminatory (or unreasonably harsh) treatment of some of the September 11 detainees. *Id.* at 32a-33a, 61a.[11] The court's reframing of respondents' allegations, however, also runs afoul of *Iqbal*.

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[11] See Pet. App. 32a n.21 (noting that respondents "did not advance the 'lists-merger theory'" in the court of appeals or district court). Respondents assert that it is "misleading" to characterize the lists-merger theory of liability as different from their own, because their fourth amended complaint mentions the lists-merger decision. Br. in Opp. 28 n.10. According to their complaint, however, the decision to merge lists was merely evidence that Ashcroft had, from the outset, intended that suspicionless arrests and severely restricted confinement would be based solely on ethnic or religious animus. Pet. App. 267a-268a (Compl. ¶ 47). The court of appeals rejected that approach but found it plausible to infer, from Ashcroft's alleged approval of the lists-merger decision, that Ashcroft newly formed a discriminatory intent at the time that approval took place. See *id.* at 32a-33a.

3. The court of appeals explained that, to state a substantive-due-process or equal-protection claim under the lists-merger theory, the complaint must plausibly plead at least four premises: (1) that petitioner Ashcroft personally made or approved the decision to merge the lists of detainees, Pet. App. 32a, 37a-42a, 61a; (2) that Ashcroft did so after learning that the New York List included some persons who had been detained in connection with the September 11 investigation in part because of their ethnicity or religion but without a determination that there was reason to suspect them of links to terrorism, *id.* at 31a-32a, 36a-38a, 61a, 65a-66a; (3) that Ashcroft also knew that at least some of the detainees on the New York List were being detained in the ADMAX SHU, *id.* at 34a-36a & n.25, 62a-63a, 67a; and (4) that Ashcroft further knew that conditions of confinement in the ADMAX SHU were so restrictive that they could not reasonably be imposed on someone for whom the government lacked individualized suspicion of terrorism connections, *id.* at 33a-35a, 45a-47a, 63a-64a.[12] Accepting the plausibility of each of those premises, the court concluded that respondents "ha[d] plausibly alleged that [petitioners] condoned and ratified the New York FBI's discrimina-

[12] The court of appeals did not view respondents' complaint as plausibly alleging that petitioner Mueller had any role in making or approving the lists-merger decision. Instead, it countenanced respondents' vague allegation that Director Mueller and INS Commissioner Ziglar had "complied with" that decision. Pet. App. 43a (quoting Compl. ¶ 47). The court suggested that their compliance had taken the form of "execution of" the decision to "hold[] ordinary civil detainees under the most restrictive conditions of confinement," *ibid.*, though it did not explain how either the FBI or the INS—neither of which was actually holding the detainees—was responsible for executing the purportedly illegal decision.

tion in *identifying* detainees by merging the New York List with the INS List." *Id.* at 67a; see *id.* at 32a-33a (describing a similar chain of reasoning for imputing "punitive intent" to petitioners for the substantive-due-process claim); *id.* at 81a (same, with respect to the Section 1985(3) conspiracy claim).

None of the conclusory allegations undergirding the court of appeals' analysis merits the presumption of truth. To begin with, as Judge Raggi explained in her dissent, nothing but "pure speculation" (Pet. App. 42a) links Attorney General Ashcroft to the actual decision to merge the two lists of detainees. See *id.* at 124a-129a. Respondents allege that Ashcroft himself made the decision. *Id.* at 268a (Compl. ¶ 47). But the Inspector General's report—which was incorporated by reference into respondents' complaint "except where contradicted by the allegations of [the complaint]," *id.* at 253a n.1—explained that the decision was made by someone who worked in the office of the Deputy Attorney General. See *OIG Report* 55-56 (J.A. 126-128). The court of appeals speculated (Pet. App. 129a) that Associate Deputy Attorney General Levey might have consulted with Attorney General Ashcroft *before* attending a November 2, 2001 meeting, which was convened "to continue discussing what to do about the separate New York [L]ist," and which culminated in Levey's "deci[sion] that all the detainees on the New York [L]ist would be added to the INS Custody List." *OIG Report* 55, 56 (J.A. 126, 128). But the mere possibility that such consultation occurred does not render the allegation of Ashcroft's involvement nonconclusory. See *Iqbal*, 556 U.S. at 681 ("[W]e do not reject these bald allegations on the ground that they are unrealistic or nonsensical. * * * It is the[ir] conclusory

nature * * * that disentitles them to the presumption of truth."). Absent any plausible suggestion that petitioners personally made or approved the decision to merge the New York List into the nationwide INS list, respondents cannot state a *Bivens* claim against them. See *id.* at 676.

Nor is it likely (as opposed to merely possible) that the regular arrest reports provided to petitioners indicated that some individuals were being detained without any evidence of a potential connection to terrorism despite an INS field order "discourag[ing] arrest in cases that were 'clearly of no interest in furthering the investigation.'" Pet. App. 17a (majority opinion) (quoting *OIG Report* 45 (J.A. 110)). That is especially so because Ashcroft and Mueller could not have *known* without further investigation that any of the individuals on the New York List were not actually dangerous. The entire premise of the facially legitimate hold-until-cleared policy was that the government did not know whether any particular detainee could be safely released until investigation had cleared him of "potential connections to those who committed terrorist acts." *Iqbal*, 556 U.S. at 682. Although respondents allege that such uncertainty is insufficient to justify application of the hold-until-cleared policy to them, they cannot reasonably dispute that the uncertainty existed.

Even assuming that petitioners made (or learned about) the lists-merger decision, that would not mean that they "intended for [respondents] to be held in the MDC's ADMAX SHU." Pet. App. 130a, 141a-142a (Raggi, J., dissenting). That premise depends on yet another unsupported inference: that petitioners might have been made aware of the conditions of confinement at the MDC. *Id.* at 132a-135a. That inference is

particularly implausible in light of the fact that, contrary to respondents' suggestion (Br. in Opp. 28), the lists-merger decision did not require any detainee to be *transferred to* "an especially restrictive form of confinement." The decision merely preserved the pre-merger status quo, in which the majority of detainees from the New York List remained in far-less-restrictive conditions at the Passaic County Jail; only those detainees who had already been confined in the ADMAX SHU were required to remain there. See Pet. App. 130a, 152a-153a (Raggi, J., dissenting). That status quo, as even the court of appeals recognized, did not reflect an unconstitutional pre-lists-merger intention on the part of petitioners. *Id.* at 31a, 47a, 63a.[13]

4. Most importantly, even if petitioners could plausibly be thought to have known about both the over-inclusiveness of the New York List and the conditions of confinement at the MDC, an inference of discriminatory intent on petitioners' part would still be unwarranted. The court of appeals found it "reasonable to infer that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists." Pet. App. 64a.

That inference, however, disregards the distinction that the *Iqbal* Court drew in the context of a *Bivens* claim between taking an action "*because of*" its "adverse effects upon an identifiable group" and doing so

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[13] The *OIG Report* mentions one instance in which an "allegation of [detainee] mistreatment" was "called to the attention of the Attorney General." *OIG Report* 20 (J.A. 73). Far from condoning mistreatment, Ashcroft reportedly called for a staff inquiry. *Ibid.*

"*in spite of*" such effects. 556 U.S. at 677 (emphases added; citation omitted). "[P]urposeful discrimination requires more than * * * 'intent as awareness of consequences.'" *Id.* at 676 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979)). And because a supervisor is liable only for his "own misconduct," the supervisor's "mere knowledge of his subordinate's discriminatory purpose" does not "amount[] to the supervisor's violating the Constitution." *Id.* at 677.

The court below conflated those concepts in holding that Ashcroft's discriminatory intent could be inferred from allegations that he had *known* about "the New York FBI field office's discriminatory formulation of [its detainee] list" (Pet. App. 64a) and had nevertheless decided that detainees on the New York List would remain subject to the hold-until-cleared policy even if they were confined at the MDC. That inference of discriminatory intent on Ashcroft's part is belied by the obvious alternative explanation for the lists-merger decision: a "concern that absent further investigation, 'the FBI could unwittingly permit a dangerous individual'" to be released. *Id.* at 19a (quoting *OIG Report* 53 (J.A. 123)). Thus, as with the initial adoption of the hold-until-cleared policy, see *Iqbal*, 556 U.S. at 683, the far simpler and more natural inference is that the decision to merge the lists was made *in spite of* concerns about how the New York List had been constructed, not because of them.

Shorn of respondents' conclusory allegations, the court of appeals' lists-merger theory is simply an end-run around the limits on supervisory liability and a rejection of the inference that the Court in *Iqbal* drew about petitioners' likely motivations for applying the

hold-until-cleared policy. Allowing this damages suit against the former Attorney General and FBI Director to proceed on such terms comes at a substantial cost—one that courts should be especially reluctant to impose in the context of the unprecedented investigation into the September 11 attacks. In such situations, national officeholders should not be "deterred from full use of their legal authority" (*al-Kidd*, 563 U.S. at 747 (Kennedy, J., concurring)) by the prospect of prolonged litigation. The Court should hold that respondents' allegations are insufficient to allow this suit to proceed past the pleading stage.

CONCLUSION

The judgment of the court of appeals against petitioners Ashcroft and Mueller should be reversed.

Respectfully submitted.

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No. 15-1359

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

AHMER IQBAL ABBASI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held that the former Attorney General of the United States and the former Director of the Federal Bureau of Investigation (FBI) may be subjected to discovery and potential damages liability for unintended consequences arising from the implementation of policy decisions they made during an unprecedented national-security crisis. The court reached that erroneous result without even addressing whether special factors counsel against extending the judicially inferred remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to the extraordinary context of this suit.

The court of appeals found respondents' allegations plausible only by manufacturing its own "lists-merger theory" of liability. Pet. App. 32a n.21. Even under that theory, the decision to maintain respondents in

restrictive conditions of confinement while their potential connections to terrorism were still being investigated did not violate any constitutional rule that was clearly established in 2001. The court of appeals' conclusion that respondents have plausibly pleaded a due-process or equal-protection violation also cannot be reconciled with this Court's reasoning about materially identical allegations in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

At the certiorari stage, respondents relied on the lists-merger theory. See Br. in Opp. 26, 28 & n.10. They now seek (Br. 50-59) to revive, as an alternative ground for affirmance, their original theory of liability: that petitioner Ashcroft's policy was unconstitutional from the outset, not just in how it was implemented. That argument is outside the scope of the question presented and, in any event, is even less compatible with *Iqbal* than is the lists-merger theory, as the court of appeals and district court both recognized.

I. Special Factors Counsel Against Extending The *Bivens* Remedy To This Novel Context

As our opening brief explains (Ashcroft Br. 18-30), the court below adopted a blinkered approach to defining the "context" of respondents' *Bivens* claims. The court erroneously concluded that this extraordinary case "stands firmly within a familiar *Bivens* context," Pet. App. 25a, and it extended the judicially inferred *Bivens* remedy without addressing whether any special factors counsel hesitation, *id.* at 29a n.17.

A. This Case Implicates The Well-Established Principle That *Bivens* Should Not Lightly Be Extended To New Contexts

1. Respondents contend (Br. 21-23) that Congress has "ratified" the private damages remedy against federal officials that this Court first recognized in its 1971 decision in *Bivens*. The statutory provisions that respondents invoke (Br. 22), however, were enacted in 1974, 1988, and 1996 and have not prevented the Court from "consistently and repeatedly recogniz[ing]" the need to exercise "caution toward extending *Bivens* remedies into any new context." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001).

Even if Congress had implicitly ratified *Bivens* in 1974, 1988, or 1996, it could not have endorsed further expansions without regard for the special-factors analysis that the court of appeals failed to conduct in this case. In recognizing a remedy for a Fourth Amendment violation, the Court in *Bivens* noted the lack of "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. Since 1983, the Court has repeatedly identified the presence of special factors as a reason not to approve further extensions. See Ashcroft Br. 19 (citing decisions declining to extend *Bivens* between 1983 and 2012). Congress therefore has provided no reason for the Court to abandon its well-established "reluctan[ce] to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 556 U.S. at 675 (quoting *Correctional Servs. Corp.*, 534 U.S. at 68).

2. As our opening brief explains (Ashcroft Br. 20-23), the court of appeals erroneously treated as a "familiar" context (Pet. App. 25a) a combination of circumstances that was wholly unprecedented both in *Bivens*

jurisprudence and in our Nation's history. Rather than continue to defend the court of appeals' flawed approach directly, respondents now seek to salvage its outcome by contending that the context of a *Bivens* claim is novel only if the claim (1) asserts "a new constitutional right," (2) involves "a new category of defendant," or (3) "creates previously unexplored separation of powers concerns." Resp. Br. 24 (internal quotation marks omitted).

Respondents' first two categories are clear examples of new contexts where courts must be reluctant to extend *Bivens*. Even as to those categories, however, respondents do not refute the observation that a context is novel when, as here, a court must "mix and match" a constitutional right in one earlier case with a category of defendant from another. Pet. App. 95a (Raggi, J., dissenting in relevant part); see *FDIC* v. *Meyer*, 510 U.S. 471, 484 n.9 (1994) ("[A] *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others.").

Respondents' third category—claims that "create[] previously unexplored separation of powers concerns" (Br. 24)—conflates the threshold question whether a claim arises in a new context with the ultimate determination whether to extend *Bivens*. In *Chappell* v. *Wallace*, 462 U.S. 296 (1983), for instance, the *context* of the plaintiffs' employment-discrimination claims was novel because those claims were brought by enlisted military personnel against their superior officers. *Id.* at 297. Whether that difference from earlier cases was a sufficient reason not to extend *Bivens* was a different question, which the Court answered by concluding that "the unique disciplinary structure of the Military Es-

tablishment and Congress' activity in the field constitute[d] 'special factors'" that made the application of *Bivens* "inappropriate." *Id.* at 304.

3. With respect to the threshold question whether the context of this case is a new one, respondents ultimately resort—as did the court of appeals (see Ashcroft Br. 20)—to describing their claims at a high level of generality. Respondents assert that they "challenge their mistreatment in federal custody" (Br. 25) and bring "an equal protection conditions-of-confinement claim" (Br. 27). But it could equally have been said in *Chappell* that the plaintiffs, like the plaintiff in *Davis* v. *Passman*, 442 U.S. 228 (1979), had brought an equal protection employment-discrimination claim. The *Chappell* Court instead described the claim before it with more specificity and accordingly found that special factors associated with the particular context of that claim compelled a different result than in *Davis*. See Ashcroft Br. 21.

The Court's references to "context" involve that term's ordinary meaning: the "interrelated conditions" in which a claim arises, or the "[s]etting or environment" of that claim. Ashcroft Br. 22 (quoting dictionary definitions). Here, the "setting" of respondents' conditions-of-confinement claims is novel, not familiar. Because respondents seek to challenge (1) high-level policy decisions that implicate both (2) national security and (3) immigration, the case involves three separate contextual factors, each of which has been identified by other courts as requiring analysis of whether *Bivens* should be extended. Ashcroft Br. 22-23 & n.7. Respondents identify no case with those attributes in

which a court considered whether *Bivens* applied and found no need to conduct special-factors analysis.[1]

The *sui generis* nature of respondents' claims warrants an evaluation of whether special factors counsel against an extension of the *Bivens* remedy.

B. The *Bivens* Remedy Should Not Be Extended To High-Level Policy Decisions That Implicate Both National Security And Immigration

1. Respondents contend (Br. 32) that the presumed absence of any other meaningful remedy for their constitutional claims "counsels strongly in favor of finding a *Bivens* remedy here." Even assuming that respondents lacked a meaningful alternative remedy,[2] that would not "strongly" favor an extension of *Bivens*.

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[1] Respondents repeatedly suggest (Br. 25-26, 27, 28) that this Court in *Iqbal* implicitly endorsed application of *Bivens* to an equal-protection claim like theirs. But because the defendants in *Iqbal* had not argued against an extension of *Bivens*, see 556 U.S. at 675, the *Iqbal* Court's *sua sponte* discussion was understandably inconclusive. The Court's failure to address what, other than a different constitutional right, would constitute "any new context" for a *Bivens* claim (*ibid.* (citation omitted)) should not prevent the Court from rejecting the decontextualized approaches proffered by respondents and the decision below.

Respondents note (Br. 28) that one defendant in *Carlson* v. *Green*, 446 U.S. 14 (1980), was the Director of the Bureau of Prisons. But the Court's discussion of potential liability did not focus on the Director's role as a policymaker. *Id.* at 16 n.1, 19.

[2] As respondents acknowledge, it is unclear whether a challenge to their conditions of confinement could have been brought under 28 U.S.C. 2241. See Resp. Br. 34 (citing *Aamer* v. *Obama*, 742 F.3d 1023, 1031-1032 (D.C. Cir. 2014), which permitted conditions-of-confinement claims). The habeas petitions filed by other September 11 detainees were mooted when those detainees were released. See *ibid.* (citing J.A. 198-201). Respondents also argue (Br. 38) that they could not bring a challenge under the Adminis-

Respondents' presumption flouts the "familiar" two-step sequence that the Court has described for evaluating whether *Bivens* should be extended to a new context. *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). The possibility of an alternative remedy is only the first step of that analysis. When there *is* such a remedy, that alone can "amount[] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* But "even in the absence of an alternative [remedy]," the second step of the analysis calls for an evaluation of "any special factors counselling hesitation." *Ibid.* (citation omitted); see *Minneci* v. *Pollard*, 565 U.S. 118, 123 (2012) (quoting same passage from *Wilkie*). At that step, "it is irrelevant * * * whether the laws currently on the books afford [the plaintiff] an 'adequate' federal remedy for his injuries." *United States* v. *Stanley*, 483 U.S. 669, 683 (1987). The Court has previously declined to extend *Bivens* in circumstances where alternative remedies would be inadequate. See, *e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 372 (1983).

The two decisions that respondents cite (Br. 32-33) do not support their presumption. In *Correctional Services Corp.*, the presence of alternative remedies meant that the analysis could end at the first step. 534 U.S. at 72-73. In *Wilkie*, the Court found that a

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trative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because the hold-until-cleared policy (and the lists-merger decision) were unwritten. Whether those policies were final agency action under the APA depended on whether they reflected the consummation of the agency's decisionmaking process, from which legal consequences would flow, see *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016), not on whether they were written or unwritten.

"patchwork" of alternative remedies was equivocal *at step one*, 551 U.S. at 554, and then proceeded to the step-two analysis it had already said would be necessary "in the absence of an alternative" remedy, *id.* at 550, ultimately concluding that "any damages remedy * * * may come better, if at all, through legislation," *id.* at 562.

2. At the second step of the analysis, special factors counsel decisively against an extension of *Bivens* here. See Ashcroft Br. 23-30.

a. Respondents do not dispute that, at least with respect to petitioners Ashcroft, Mueller, and Ziglar, they challenge high-level policy decisions, rather than the unauthorized actions of rogue officers that have been the traditional targets of *Bivens* actions. See Ashcroft Br. 24. Respondents nevertheless suggest that *Bivens* liability is "*more* vital" to "ensur[ing] accountability" in this context because high-level policy decisions may take effect "'on a massive scale.'" Resp. Br. 37 (quoting *Butz* v. *Economou*, 438 U.S. 478, 506 (1978)). They also persist in suggesting (Br. 29, 38) that declining to extend *Bivens* to policy decisions would "effectively overturn[]" the denial of absolute immunity for the Attorney General in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

Since *Butz* and *Mitchell*, however, the Court has reiterated that special-factors analysis is separate from the scope-of-immunity question. See *Stanley*, 483 U.S. at 684-686; see also Ashcroft Br. 25-26. Moreover, individual damages liability is not the only, or even the best, way to foster accountability, especially for policy decisions. See *Stanley*, 483 U.S. at 683 (explaining that "redress designed to halt or prevent [a] constitutional violation" need not take the form of an "award of

money damages"). The larger the scale of any unconstitutional policy decisions, the more likely, and more beneficial, a legislative response would be. And, of course, the larger the policy, the larger the potential damages award against the defendant. See *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (en banc) (noting, as reason for skepticism of *Bivens* liability for policy decisions, the potential for a regulation to "impose[] billions of dollars in unjustified costs before being set aside"), cert. denied, 133 S. Ct. 2796 (2013). Congress is better positioned than a court to "tailor any remedy to the problem perceived," *Wilkie*, 551 U.S. at 562, including by taking account of sensitivities associated with litigation about the subject. See Ashcroft Br. 27 (describing statutory safeguards for national-security interests in certain kinds of litigation).

Respondents do not dispute that high-level policy decisions will more likely be scrutinized by Congress or an Inspector General, and hence by the public. Seeking to minimize the import of such scrutiny in this case, respondents state (Br. 38-39) that the Inspector General Report on which the claims in their Fourth Amended Complaint critically rely was "motivated by, among other things, *this lawsuit*." The Inspector General's investigation, however, began in March 2002—weeks *before* the initial complaint in this lawsuit was filed. Compare Office of the Inspector Gen., U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 5 (Apr. 2003) (*OIG Report*) (reprinted at J.A. 49), with J.A. 17 (docket entry for April 17, 2002 filing of complaint).

Finally, the Court has already explained that it has "never considered" the "*Bivens* remedy" to be "a proper vehicle for altering an entity's policy." *Correctional Servs. Corp.*, 534 U.S. at 74. The "proper means for preventing entities from acting unconstitutionally" would instead be "injunctive relief." *Ibid.* Even where Congress has authorized such relief under, for instance, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, individual-capacity *Bivens* claims have not been seen as appropriate additions to APA suits challenging unconstitutional policy decisions. See *Vance*, 701 F.3d at 205 ("[T]he normal means to handle defective policies and regulations is a suit under the [APA] or an equivalent statute, not an award of damages against the policy's author.").

b. Judicial caution about extending *Bivens* is particularly appropriate here because the challenged policy decisions involved both national security and immigration. See Ashcroft Br. 26-30. Respondents suggest (Br. 43) that "national security" concerns are limited to "the discrete sphere of the military." But courts' traditional "reluctan[ce] to intrude" has applied to "military *and national security* affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) (emphasis added). Here, as in the military context, there is a constitutional commitment of authority to Congress and the President. The special factor counselling hesitation is "not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion * * * by the judiciary is inappropriate." *Stanley*, 483 U.S. at 683. The exercise of common-law rulemaking through a judicial damages remedy is not appropriate because courts lack the expertise to tailor such a remedy. And this is an

area in which the risk of over-deterrence—especially for potential damages resulting from broad policy decisions—could have substantial consequences for the security of the Nation. Those consequences should be left for Congress to evaluate.

Respondents further contend (Br. 29, 39-42) that immigration-law concerns were irrelevant to their detention, and they caricature our position as reflecting the view that aliens lack constitutional rights against mistreatment. The unavailability of a *Bivens* remedy, however, does not alter the scope of the underlying constitutional protections. The relevant point for special-factors purposes is not that the boundaries of unconstitutional conditions of confinement are defined differently for aliens than for U.S. citizens, but that Congress has established a detailed scheme governing claims of unlawful immigration detention, which (even if it falls short for these plaintiffs) discountenances judicial creation of an additional remedy in damages under *Bivens*.[3]

That is true when the suit in question challenges high-level policy decisions that were already more likely to be subjected to non-judicial scrutiny. And it is especially true when the suit challenges the re-

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[3] Respondents' reasoning would have allowed the First Amendment claim in *Bush*, 462 U.S. at 380, the equal-protection claim in *Chappell*, 462 U.S. at 297, or the due-process claim in *Schweiker* v. *Chilicky*, 487 U.S. at 414, because those substantive areas of constitutional law did not change in the contexts of civil-service personnel actions, the military chain of command, or social-security-disability benefits. Here, consistent with the analysis in those cases, the immigration component is relevant because of the political branches' heightened control over the area and the intricate nature of the scheme that Congress has established. Ashcroft Br. 29.

sponses to an unprecedented national-security crisis. The political branches are not immune from judicial review. But policymakers should not be subject to potentially massive personal liability for the difficult policy judgments they made in the course of responding to the worst terrorist attack in our Nation's history.

II. Petitioners Are Entitled To Qualified Immunity Because It Was Not Clearly Established In 2001 That Aliens Legitimately Arrested During The September 11 Investigation Could Not Be Maintained In Restrictive Conditions Of Confinement Until They Were Cleared Of Any Connections With Terrorism

The court of appeals also erred in holding that petitioners Ashcroft and Mueller are not entitled to qualified immunity. See Ashcroft Br. 30-40. Respondents still have identified no decision indicating, much less clearly establishing, that in the unprecedented circumstances of this case, continuing to apply the hold-until-cleared policy to them was so arbitrary as to constitute a punitive or discriminatory act.

1. Respondents contend that, because petitioners allegedly knew that "there was no reason to suspect *these men* of terrorism, [r]espondents were no different than any ordinary immigration detainee," Br. 71 (emphasis added), and therefore could not be subjected to the restrictions associated with the Administrative Maximum Special Housing Unit (ADMAX SHU) at the Metropolitan Detention Center (MDC). But petitioners could not have known that there was no reason to suspect "these men," or any particular September 11 detainees. At most, they knew that "*many* detainees were arrested without any articulable interest," Resp. Br. 62, and that "many" of those arrested before September 22, 2001, "might not have a nexus to

terrorism." Resp. Br. 58 (quoting J.A. 109-110). Despite that knowledge, however, there remained reason to suspect that at least some of the detainees *did* have potential connections to terrorism, and further investigation was needed to determine which detainees fell within that category. The merger of the New York List and the national INS List, combined with the continued application of the hold-until-cleared policy, effectively decided that the further investigation would take the form of the already-established clearance process. Respondents identify no judicial decision clearly establishing as of 2001 that such an approach was unconstitutional.

Respondents analogize (Br. 71-72) their case to *Korematsu* v. *United States*, 323 U.S. 214 (1944), in which all persons of Japanese ancestry in designated military areas were relocated and then detained. But even respondents' complaint did not allege that the policy decisions challenged in this case meaningfully resemble the invidious race-based classification at issue there. Respondents do not claim that all aliens of Arab or Muslim origin in the New York region were arrested and detained (let alone U.S. citizens, as in *Korematsu*). Nor is it accurate for respondents to describe (Br. 71) themselves as being indistinguishable from "any ordinary immigration detainee—except they appeared to be Arab or Muslim." Unlike ordinary immigration detainees, respondents had been arrested in connection with the September 11 investigation, and they were in the small minority of such arrestees who had been selected by arresting agents for detention in the ADMAX SHU rather than in a less-restrictive facility such as the Passaic County Jail. See Ashcroft Br. 4-5. The decision to preserve the status quo while

the clearance process continued therefore was not the equivalent of selecting a pretrial prisoner for solitary confinement at "random[]" or solely because of his race. Resp. Br. 68.

2. This Court has repeatedly sustained the application of restrictive conditions to entire groups of detainees when those restrictions were reasonably related to a legitimate governmental objective. Ashcroft Br. 35-36 (discussing *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012); *Whitley* v. *Albers*, 475 U.S. 312, 316 (1986); *Block* v. *Rutherford*, 468 U.S. 576, 587 (1984); *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979)). Rather than contest the general proposition that circumstances may support a particular group-wide restriction, respondents make (Br. 73) the following two assertions: "Plainly no prison system could place all of its civil detainees in solitary confinement. And it certainly could not decide which detainees to subject to solitary confinement arbitrarily, or on the basis of race." But the government did not adopt either of those two approaches in its post-September 11 investigation, and preventing the subgroup of September 11 detainees who were at the MDC from potentially communicating with others while the clearance process continued was not so "arbitrary or purposeless to national security" as to be clearly unconstitutional. Pet. App. 141a (Raggi, J., dissenting in relevant part). That decision was, at worst, the kind of "reasonable but mistaken judgment[] about open legal questions" that "[q]ualified immunity gives government officials breathing room to make." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011).

The Court should conclude, as did six members of the Second Circuit (Pet. App. 241a, 246a-247a), that

the court of appeals erred in denying qualified immunity to petitioners Ashcroft and Mueller for respondents' constitutional claims.

3. Even if respondents had adequately alleged a violation of constitutional equal-protection rights that were clearly established as of late 2001, the defendants in this case would be entitled to qualified immunity from liability under 42 U.S.C. 1985(3). Respondents contend (Br. 91-93) that any clear violation of constitutional equal-protection principles protected by Section 1985(3) suffices to establish a clear violation of the statute. But because the qualified-immunity analysis is right-specific, proof that a defendant violated one clearly established right does not negate his immunity for a different claimed violation. See Ashcroft Br. 39 (citing cases). The defendants therefore are entitled to qualified immunity from respondents' Section 1985(3) claims unless it was clear in late 2001 that their alleged conduct violated *that statute*. Respondents cannot make that showing, since they do not contest that "it was unclear in 2001 that [S]ection 1985(3) applied to federal officials." Resp. Br. 91.

III. Respondents Have Not Plausibly Alleged That Petitioners Personally Condoned The Implementation Of Facially Constitutional Policies In A Discriminatory Or Unreasonably Harsh Manner

As our opening brief explains (at 47-49), respondents have not plausibly alleged that petitioner Ashcroft or Mueller acted with a discriminatory or punitive intent in approving or implementing the decision, several weeks into the September 11 investigation, to keep detainees from the New York List in the facilities where they had previously been sent, pending their clearance of any connection with terrorism. As in

Iqbal, it remains more likely that such a decision was motivated by the obvious alternative intent to prevent a dangerous individual from being released, and that it was made *in spite of*, rather than because of, any concerns that some (but not all) of the initial arrests and classification decisions reflected discrimination by others. See 556 U.S. at 677, 682-683.

1. Respondents seek to curtail pleading-plausibility analysis in two principal ways. The Court should reject those arguments.

a. Respondents contend (Br. 48) that *Iqbal*'s disavowal of a "probability" standard relieves a plaintiff of any obligation to "show that her claims are *more* plausible than any other possible explanation for the facts alleged." That argument is both misleading and irrelevant. The *Iqbal* Court's admonition that "[t]he plausibility standard is not akin to a 'probability requirement'" means only that courts should not reduce to a mathematical exercise the "context-specific" inquiry under Rule 8 of the Federal Rules of Civil Procedure. 556 U.S. at 678, 679 (citation omitted). "[T]he well-pleaded facts" still must "permit the court to infer more than the mere possibility of misconduct." *Id.* at 679. Even when a factual allegation might raise an inference of discriminatory intent, it does not ineluctably follow that the suit can go forward. "Determining whether a complaint states a plausible claim for relief will * * * be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ibid.*

b. Respondents also attempt to shrink the category of allegations that should be disregarded as "conclusory" by distinguishing between "factual" allegations (which in respondents' view cannot be conclusory and

"must be accepted as true even without corroboration," Br. 60-61) and "mere conclusory statements that mirror the elements of a cause of action," Br. 47. Respondents describe (Br. 60) a "factual" allegation as one that "can be verified or not through typical means of proof." But that definition is inconsistent with *Iqbal*, in which the Court rejected as conclusory the allegation that Ashcroft and Mueller "knew" that Iqbal was being subjected to harsh conditions of confinement "solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." 556 U.S. at 680 (brackets in original) (quoting the complaint in that case). That allegation would have been verifiable through "typical means of proof." So, too, would have been the allegation (also rejected by the Court as conclusory) that Ashcroft was the "principal architect" of the allegedly invidious policy. *Ibid.* Under the Court's approach, what matters is not whether a question can be described as "factual," but whether the factual allegations and the underlying claim "present one of 'those contexts' requiring amplification." *Id.* at 670. Whether allegations merely restate the elements of a cause of action is part of that inquiry but not the end of it.

That principle explains why the Court should not credit respondents' mainstay allegation (Br. 53) that Ashcroft and Mueller personally knew that there was no "legitimate reason to suspect [respondents] of ties to terrorism." See also Resp. Br. 20, 30, 45-46, 55, 60, 62, 70-72. Respondents frame that allegation as an analytical predicate of their (concededly conclusory) allegation that Ashcroft and Mueller acted with improper intent. Respondents view that pair of allega-

tions as sufficient to *foreclose* the possibility that Ashcroft and Mueller had lawful motives.

That approach cannot be reconciled with this Court's decision in *Iqbal*. Respondents attempt (Br. 52) to distinguish the two cases on the ground that Iqbal had made no "factual allegations linking [Ashcroft and Mueller] to the decision to subject Muslim and Arab detainees *without suspected ties to terrorism* to restrictive conditions." In fact, the complaint in *Iqbal* specifically alleged that Ashcroft and Mueller "'*knew of* * * * and willfully and maliciously agreed to subject'" Iqbal to "harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" 556 U.S. at 680 (emphasis added; brackets in original) (quoting the complaint). If respondents' analytical approach were correct, the Court should have presumed that Iqbal's allegation as to Ashcroft and Mueller's *knowledge* was true. The Court deemed the allegation conclusory, however, because it "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 681.

2. Under the plausibility analysis that *Iqbal* prescribes, respondents' allegations do not support the lists-merger theory of liability. Respondents contend (Br. 53) that, "[b]ased on years of discovery, they were able to allege what was missing in *Iqbal*": that there was a policy "to target Muslims and Arabs regardless of whether there was a legitimate reason to suspect them of ties to terrorism" and to "subject them to harsh restrictions." But there is ultimately no material difference between the allegations in *Iqbal* and those in respondents' complaint.

Respondents assert (Br. 54 n.14) that, "unlike Mr. Iqbal, [they] do not allege that they were placed in restrictive confinement based on a law enforcement officer's determination that they were of 'high interest' to the terrorism investigation." But Iqbal himself contended that "he was presumptively characterized as 'of high interest' * * *, solely because of his race, religion, and national origin, and for no legitimate reason." Resp. Iqbal Br. at 3, *Iqbal*, *supra* (No. 07-1015); *id.* at 52 n.9 (referring to alleged "blanket policy that Muslims, Arabs, and South Asians were presumptively suspicious"). The few details that respondents add to Iqbal's allegations do not detract from the Court's obligation to "draw on its judicial experience and common sense" in performing the "context-specific task" of "[d]etermining whether a complaint states a plausible claim for relief." *Iqbal*, 556 U.S. at 679.

Like those of the plaintiff in *Iqbal*, respondents' claims fail that test. Even assuming the truth of their allegation that petitioner Ashcroft or Mueller knew of no connection between respondents and terrorism, that state of affairs was still "merely consistent with" an unlawfully discriminatory or punitive intent. *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)). The absence of knowledge of any connection to terrorism is not equivalent to knowledge of the absence of such a connection.

Taking respondents' allegations in context, petitioners also knew that respondents had been arrested in connection with the September 11 investigation and that they were part of the small minority of such arrestees who had been selected by arresting officers for detention under the most secure conditions. Moreover, there was reason to suspect that *at least some* of

the individuals on the New York List did have potential connections to terrorism. See pp. 12-13, *supra*. Thus, as in *Iqbal*, it is still most likely that the decision to merge the lists and keep respondents in custody at the MDC during the clearance investigation was motivated, as the *OIG Report* concluded, by a reasonable desire to protect against the "unwitting[]" release of "a dangerous individual." Pet. App. 19a (quoting *OIG Report* 53 (J.A. 123)); see *Iqbal*, 556 U.S. at 682-683.[4]

3. As an alternative ground for affirmance, respondents reprise (Br. 50-59) their original theory of liability, contending that the September 11 investigation and the hold-until-cleared policy were unconstitutional from the outset, not just after the lists-merger decision. That argument provides no sound basis for affirming the judgment below.

a. As an initial matter, respondents' alternative theory is outside the scope of the question presented, which explicitly assumes that the policies in question were "facially constitutional." Pet. i; see Sup. Ct. R. 14.1(a). Respondents' brief in opposition (at 26, 28 & n.10) defended the narrower lists-merger theory, but it did not assert that respondents' broader theory "properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. Those considerations provide sufficient grounds for the Court to disregard respondents' alternative argument. See *Kasten* v. *Saint-*

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[4] Respondents suggest (Br. 64) that our argument on this score applies only to their discrimination claim, not to their substantive-due-process claim. But as respondents note (*ibid.*), "the court of appeal[s'] approach" to both claims "largely flowed from th[e] same analysis." So does our response. The more-likely alternative intent (*i.e.*, to protect the public against the unwitting release of dangerous individuals) renders the allegations of a discriminatory and a punitive intent equally implausible. See Ashcroft Br. 43.

Gobain Performance Plastics Corp., 563 U.S. 1, 16-17 (2011); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

b. In any event, respondents' broader theory of liability is even less compatible with *Iqbal* than is the lists-merger theory. The court of appeals majority held that respondents had "fail[ed] to plead that Ashcroft's initial arrest and detention mandate required subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism." Pet. App. 31a; see also *id.* at 238a-239a (Pooler and Wesley, JJ., concurring in denial of rehearing en banc). The dissenting judge agreed. See *id.* at 122a-123a (Raggi, J.). So did the district court, which noted respondents' concession at oral argument that their theory required the court to infer a punitive intent on the part of petitioners Ashcroft, Mueller, and Ziglar from their "failure to specify that the harsh confinement policy should be carried out *lawfully*." *Id.* at 198a.

Even in their merits brief, respondents do not explain why it is plausible to infer that, from the outset, the hold-until-cleared policy required not just the arrest and detention of persons who were in violation of the immigration laws, but also the imposition of conditions of confinement that would be unconstitutionally punitive or discriminatory. Respondents acknowledge that petitioners Ashcroft, Mueller, and Ziglar "did not create the particular conditions in question," Br. 57, but view that fact as irrelevant because "Ashcroft and his small working group instructed that [r]espondents be restricted from contacting the outside world, and such restriction could only be accomplished by placement in a Special Housing Unit," Br.

55 (citation omitted). As support, however, respondents cite a passage from the *OIG Report*, which described the desire that prison authorities "limit, as much as possible *within their lawful discretion*, the detainees' ability to communicate with other inmates and with people outside the MDC." *Ibid.* (emphasis added) (quoting J.A. 72).[5]

Respondents also criticize (Br. 58) the court of appeals for relying on a September 22 order "discourag[ing] arrests in cases that were 'clearly of no interest in furthering the investigation of the terrorist attacks,'" Pet. App. 17a (quoting *OIG Report* 45 (J.A. 110)). In respondents' view, the September 22 order "reflect[ed] an awareness that arrests were being made on the basis of religion, race and ethnicity." Resp. Br. 58. But if respondents were correct about the intentions underlying the original policy, there would have been no reason to issue the September 22 order, because it would not have been any cause for concern that "many of the people arrested . . . might not have a nexus to terrorism." *Ibid.* (quoting J.A. 109-110).

Finally, respondents criticize (Br. 58) the court of appeals for relying on the fact that the FBI's New York field office implemented the mandate in a different fashion than did law-enforcement officials in the rest of the country. Respondents view (*ibid.*) that disparity as irrelevant because "there is no indication" that the differences were "in violation of orders from headquarters." In practical effect, respondents ask the

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[5] The district court dismissed the claims that restrictions on respondents' ability to communicate were unconstitutional, Pet. App. 211a-220a, and respondents did not include those claims in their cross-appeal, *id.* at 20a n.13.

Court to infer a punitive or discriminatory intent from petitioners' failure to specify affirmatively that detentions should be carried out lawfully. That argument ignores *Iqbal*'s admonition that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 556 U.S. at 676.

If the Court reaches respondents' alternative theory, it should uphold the court of appeals' conclusion that "the DOJ Defendants had a right to presume that subordinates would carry out [the arrest and detention mandate] in a constitutional manner." Pet. App. 31a.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals against petitioners Ashcroft and Mueller should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

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